No. 90-1378

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES GYPSUM COMPANY, ET AL., PETITIONERS

v.

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,
And A Conditionally Certified Class, RESPONDENTS

and

THE HONORABLE JAMES MCGIRR KELLY,
NOMINAL RESPONDENT

IN RE ASBESTOS SCHOOL LITIGATION

D.C. Master File No. 83-0268

Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRITS OF CERTIORARI

THOMAS W. KIRBY *
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20019
(202) 429-7000
Attorney for Kaiser Gypsum Company, Inc.

JOHN H. LEWIS, JR.*
PETER BUSCEMI
JOSEPH B.G. FAY
J. GORDON COONEY, JR.
ANDREW D. LEIPOLD
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000
Attorneys for United States Gypsum Company

* Counsel of Record for this Petitioner

[Additional Counsel on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

170

DENIS MCINERNEY *
ALLEN S. JOSLYN
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for
W.R. Grace & Co.

* Counsel of Record
for this Petitioner

WILLIAM J. O'BRIEN *
NANCY J. GELLMAN
CONRAD O'BRIEN GELLMAN
DESTEFANO & ROHN, P.C.
1515 Market Street
16th Floor
Philadelphia, PA 19102
(215) 864-9600
Attorneys for
Fibreboard Corporation

March 4, 1991

QUESTIONS PRESENTED

1. Whether under the federal diversity statute, 28 U.S.C. § 1332, plaintiffs in a diversity case must include in the complaint factual allegations sufficient to support subject matter jurisdiction over each of the claims presented.

2. Whether in a diversity-based class action brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure, each plaintiff must be diverse from each defendant from whom that plaintiff seeks to recover.

LIST OF INTERESTED PARTIES

This petition is filed on behalf of four petitioners: United States Gypsum Company, Kaiser Gypsum Company, Inc., W.R. Grace & Co., and Fibreboard Corporation.

USG Corporation is the parent company of petitioner United States Gypsum Company. United States Gypsum Company has no subsidiaries that are not wholly owned.

The parent company of petitioner Kaiser Gypsum Company, Inc. is Kaiser Cement Corporation. The only non-wholly owned subsidiary or affiliate of Kaiser Gypsum Company, Inc. is Gypsum Carrier, Inc.

Petitioner W.R. Grace & Co. (renamed W.R. Grace & Co.—Conn. since the pleadings herein) is now a wholly owned subsidiary of W.R. Grace & Co., a publicly traded company with no parent company. Other than wholly-owned subsidiaries, subsidiaries of petitioner or its parent (or their subsidiaries) are Del Taco Corporation, Del Taco Restaurants, Inc., Grace Energy Corporation, Grace Drilling Company, and La Posta Recycling Center Inc.

Petitioner Fibreboard Corporation has no parents or non-wholly owned subsidiaries.

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PETITION FOR WRITS OF CERTIORARI

Petitioners United States Gypsum Company ("U.S. Gypsum"), Kaiser Gypsum Company, Inc., W.R. Grace & Co., and Fibreboard Corporation, respectfully petition for writs of certiorari to review the judgments and opinions that were issued in companion cases by the court below.[1]

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[1] The court of appeals has issued two judgments and opinions that are the subject of this petition. The first decision arises from petitions seeking writs of mandamus and prohibition (court of appeals docket numbers 90-1125, 90-1126, 90-1185, 90-1199); the sec-

OPINIONS BELOW

The opinions of the court of appeals (App. 1a-14a and App. 45a-63a) are reported at 921 F.2d 1310 and 921 F.2d 1339. The opinion of the district court (App. 64a-72a) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on December 13, 1990. Kaiser Gypsum filed a timely petition for rehearing and suggestion for rehearing *en banc* (No. 90-1125), which was denied on January 9, 1991. U.S. Gypsum filed a timely consolidated petition for rehearing and suggestion for rehearing *en banc* (Nos. 90-1126 and 90-1248), which was denied on January 15, 1991. App. 79a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the federal diversity statute, 28 U.S.C. § 1332(a), which provides in relevant part:

> The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States . . . .[2]

STATEMENT OF THE CASE

This petition arises from three consolidated, nationwide class actions in the district court for the Eastern District of Pennsylvania, the first of which was filed in January 1983.[3] Each of the actions raises state-law claims on be-

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ond arises from direct appeals of a final judgment entered under Fed. R. Civ. P. 54(b) (court of appeals docket number 90-1248).

[2] Since this litigation began, § 1332(a) was amended to raise the minimum required amount in controversy from $10,000 to $50,000. *See* App. 11a.

[3] *School District of Lancaster, et al. v. Lake Asbestos of Quebec, et al.*, No. 83-0268 (E.D. Pa., filed January 17, 1983); *Barnwell*

half of the owners or operators of public and non-profit elementary and secondary schools throughout the country (the "plaintiffs"). The defendants are petitioners and approximately 45 other manufacturers and producers of asbestos-containing materials. The claims are based on the alleged presence of asbestos-containing building materials in an unknown number of the plaintiffs' school buildings. As originally certified, the class apparently consisted of 35,711 plaintiffs; class membership did not require that the schools involved have any asbestos-containing products in their buildings.

The complaints allege that the district court has subject matter jurisdiction over the claims of each plaintiff on the basis of diversity of citizenship. *See, e.g.*, App. 87a. At the time the complaints were filed, the federal diversity statute provided that the district court had jurisdiction when the "matter in controversy" was: (1) greater than $10,000; and (2) between citizens of different states. 28 U.S.C. § 1332(a).

The original complaints simply alleged that the *entire* "matter in controversy exceeds . . . the sum of ten thousand dollars." *See* App. 75a. Because there was no way to determine from this allegation which plaintiffs were properly asserting claims, *i.e.*, no way for defendants to know against whom they were litigating, petitioners moved to dismiss the absent class members' claims without prejudice, on the ground that this allegation was insufficient to invoke diversity jurisdiction.[6] Petitioners pointed out that under *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), *each* plaintiff pursuing a separate

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School District v. U.S. Gypsum Co., et al., No. 83-1295 (E.D. Pa., filed March 23, 1983); *Board of Education of the Memphis City Schools v. U.S. Gypsum, et al.*, No. 84-2312 (E.D. Pa., filed May 11, 1984).

[6] These plaintiffs referred to here as "unnamed" or "absent" class members are the school districts whose names do not appear in the captions of the complaints. The complaints contain additional allegations that address the amount in controversy for the class representatives only.

claim in a diversity-based class action is required to present an independent "matter in controversy" in excess of $10,000. Petitioners also argued that the complaints were deficient because they did not allege that each plaintiff was of diverse citizenship from each defendant from which that plaintiff sought recovery.

The District Court Proceedings

The district court initially ordered the plaintiffs to amend the complaints to "correct the existing pleading deficiencies." App. 76a. Plaintiffs' amended complaints, however, did not allege that "each" member of the class had a claim in excess of $10,000, nor did they identify any unnamed class member that could have made the required allegation. In fact, the amended complaints made it clear that a proper allegation could *not* be made on behalf of each plaintiff:

> The plaintiff and all members of the class (except a minimal portion thereof) have claims in excess of $10,000 . . . . Entities (not now identified) may exist . . . who cannot allege $10,000 in controversy.

App. 91a.[3] In addition, the amended complaints continued to allege only that each *named* plaintiff was diverse from the defendants that were named in that plaintiff's complaint. *See* App. 87a-91a.

The amended complaints admitted that each of the cases presented an unspecified number of claims over which the district court had no jurisdiction, but plaintiffs either could not or would not identify the class members who were raising these claims. The amended jurisdictional allegation exacerbated the concerns that had prompted the motions to dismiss, as it left each absent plaintiff in a position to assert, in subsequent litigation, that it was part of the "minimal portion" of the defined class that did not have a claim in excess of $10,000 in January 1983. The amended jurisdictional allegation

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[3] The three complaints in these cases are identical in all material respects. For simplicity, only the relevant portions of the *School District of Lancaster* complaint have been reproduced in the Appendix.

therefore made it impossible to determine which schools would be bound by a judgment.[6]

Given the failure to make a proper allegation on behalf of any class member (other than the named plaintiffs), petitioners again filed a motion to dismiss without prejudice, citing, *inter alia*, Federal Rule of Civil Procedure 12(h)(3), which requires a court to dismiss the action "whenever" it appears that subject matter jurisdiction is lacking.[7] This time, however, the district court denied the motion. App. 64a-72a. In its order, the district court did not find that it actually *had* jurisdiction over each of the claims; instead, it focused entirely on the *factual* question of which plaintiffs might ultimately be able to *prove* claims in excess of the jurisdictional amount. The district court concluded that it was unable to resolve that question on the existing record.

Erroneously assuming that its jurisdiction turned on the amount of damages ultimately proved (rather than alleged), the district court held that under Rule 12(d), it had the power to defer resolution of petitioners' challenge.[8] Noting that a multi-stage trial was contemplated, the district court stated:

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[6] These actions may be contrasted with a class action grounded in federal question jurisdiction, where classes are often defined as all plaintiffs who share certain objective facts essential to the substance of the action. Such actions do not generally raise jurisdictional issues, and the effect of judgments rendered in those actions can be established in subsequent litigation, if need be, by determining whether the plaintiff's allegations in the second action demonstrate that the plaintiff's claim satisfied those objective criteria that defined the class in the first action.

[7] Rule 12(h)(3) provides:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

[8] Rule 12(d) provides that a motion under Fed. R. Civ. P. 12(b)(1) challenging subject matter jurisdiction:

> shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

> [a]ny potential jurisdictional problems raised in this case can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000.

App. 66a.

The district court then reversed field again. Having just acknowledged that at minimum the jurisdictional defects must be cured before the entry of final judgment, the district court approved a settlement between all plaintiffs and one of the defendants, Lake Asbestos of Quebec Ltd. ("LAQ"). App. 119a-128a. *See* Fed. R. Civ. P. 23(e) (requiring court approval before class action claims can be dismissed pursuant to a settlement). Then, over petitioners' objections, the district court entered an order dismissing with prejudice all claims against LAQ, and certifying the dismissals as a "final judgment" under Rule 54(b). App. 125a. No effort was made to determine which of the claims being dismissed had been properly before the court.

The Court of Appeals' Decisions

A petition for a writ of prohibition and two petitions for a writ of mandamus were filed in the court of appeals, challenging the district court's subject matter jurisdiction. *See* 28 U.S.C. § 1651 (All Writs Act).[2] The court of appeals was asked to require the dismissal of those claims for which no adequate jurisdictional allegation was made, or, at a minimum, to prohibit the district court from adjudicating the merits of these claims until adequate pleadings were filed. In addition, two direct appeals were filed from the entry of final judgment dismissing all claims against LAQ. Each of the appeals

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[2] Although the petition for a writ of prohibition sought different relief from the writs of mandamus, the standards governing the issuance of the two writs are virtually the same. As the court of appeals observed, "modern courts have shown little concern for the technical and historic differences between the two writs." App. 8a (citing 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3932 (1977 & 1990 Supp.)).

questioned the district court's power to enter a final judgment before correcting the jurisdictional defects.

Petitioners argued on appeal that if the resolution of the jurisdictional challenge were deferred until the "damage phase" of the trial, defendants might *never* learn the identities of the plaintiffs with proper claims. Petitioners argued that should they prevail in these actions before damages were assessed (*e.g.*, on summary judgment or in a liability phase of trial), the identities of the class members would remain unknown. Thus, although defendants would have "won" the case, they would not be able to bind any class member to the judgment under principles of *res judicata*, because none of the unnamed class members would ever have alleged that they were properly before the district court. It was also argued that until the court determines which plaintiffs were part of the class, settlement of the claims would be virtually impossible, as defendants would be required to "settle" with a group that included an unknown number of parties who could not be bound.[10]

a. *The Mandamus/Prohibition Opinion*

In a 2-1 opinion, the court of appeals denied the requests for relief under the All Writs Act. The majority recognized petitioners' concern that class plaintiffs "have not met their burden of pleading the $10,000 jurisdictional amount in controversy . . . ." App. 11a. Nevertheless, the majority concluded that the district court had the discretion to defer all jurisdictional challenges until trial.

The court of appeals based its conclusion primarily on Fed. R. Civ. P. 12(d), which the court interpreted to allow deferral of challenges to the adequacy of the pleadings. *See* App. 12a. The court also concluded that the district court could exercise jurisdiction until it appeared

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[10] The fact that LAQ had settled with plaintiffs did not undermine this argument. The LAQ settlement agreement stated that should it be determined that the district court lacked subject matter jurisdiction, the agreement would be void.

to a "legal certainty" that specific plaintiffs did not *in fact* have the required amount in controversy. The court of appeals stated that its position was supported by *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). *See* App. 13a.

The majority further held that there need *not* be complete diversity between plaintiffs and defendants in a class action under Rule 23. In reaching this conclusion, the court relied primarily on *dicta* from *Snyder v. Harris*, 394 U.S. 332 (1969), and on the Second Circuit's decision in *In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2d Cir.), *cert. denied*, 484 U.S. 1004 (1987). The court rejected the argument that *Zahn* and more recent decisions of this Court, notably *Finley v. United States*, 109 S. Ct. 2003 (1989), *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), and *Aldinger v. Howard*, 427 U.S. 1 (1975), had undermined the notion that class members asserting separate claims could proceed in federal court in the absence of an independent jurisdictional basis for those claims.

Judge Cowen dissented. App. 21a-44a. He criticized the conclusion that the district court could postpone a determination of its subject matter jurisdiction, noting that this was inconsistent with the well-settled principle that jurisdictional questions are to be resolved at the outset of the litigation. In particular, the dissent recognized that there was no reason to defer a *facial* attack on the jurisdictional allegations:

> In the case before us, plaintiffs have failed to make [a] sufficient jurisdictional allegation with respect to the amount in controversy of each represented plaintiff. Because plaintiffs have admitted this in their amended complaints, there is no factual question to resolve.

App. 28a n.4.

The dissent also took issue with the holding that there is a special jurisdictional rule in class actions, whereby only the named plaintiffs need be diverse from the defendants. Judge Cowen observed that because the Fed-

eral Rules of Civil Procedure cannot create or expand federal jurisdiction, such a special rule would require the exercise of "pendent party jurisdiction" over non-diverse parties. That result, he correctly recognized, would be inconsistent with recent decisions of this Court. App. 36a n.9, 43a.

b. *The LAQ Settlement Opinion*

In the appeal from the final judgment dismissing all claims against LAQ, petitioners argued that even if *deferral* of a jurisdictional challenge were proper, the district court could not enter a final judgment affecting all plaintiffs before *resolving* that issue. Nevertheless, after denying the mandamus and prohibition petitions on the theory that the district court could postpone a determination of its own jurisdiction, the court of appeals assumed appellate jurisdiction under 28 U.S.C. § 1291, and *affirmed* the entry of judgment as to all class members in the LAQ appeal. App. 45a. Perplexingly, the majority now assumed that jurisdiction existed in the district court, simply because the court of appeals had approved deferral of the jurisdictional challenge:

> We determined [in the opinion concerning the writs of prohibition and mandamus] that the defendant petitioners had not met their burden of showing a "clear and indisputable lack of subject matter jurisdiction in the district court." Thus, jurisdiction in the trial court was proper based on 28 U.S.C. § 1332.

App. 49a. The court of appeals went on to conclude that petitioners lacked standing to challenge the district court's ruling on the merits.[11]

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[11] U.S. Gypsum had argued that it had standing to contest the entry of final judgment on all claims against LAQ, given that the district court's order could be interpreted as a finding that there was *in fact* jurisdiction over each of the plaintiffs' claims. Kaiser Gypsum also argued that it had standing to challenge the settlement to protect its right to assert contribution claims against LAQ.

Judge Cowen again dissented (App. 53a-63a), restating his belief that the district court lacked jurisdiction. He also said:

> the district court determined that it could exercise jurisdiction over the consolidated cases, *as long as* it entered no final judgment in favor of a plaintiff with a jurisdictionally insufficient claim. Entry of final judgment before identifying which plaintiffs must be dismissed undermines the only basis on which the district court can conceivably maintain jurisdiction over this case. . . . I would require that the district court postpone the entry of final judgment against LAQ until it first determines that it has jurisdiction over every plaintiff who will share in the judgment . . . .

App. 56a-57a.

On December 17, 1990, after the court of appeals' opinions were issued, plaintiffs obtained leave to redefine the class as only those schools with "friable" asbestos-containing material.[12] The identities of the schools in the new class—a subset of the class previously certified—were not provided, and are unknown to this day.[13] Although plaintiffs continue to suggest that the vast majority of schools with friable asbestos-containing material would ultimately be able to prove damages in excess of $10,000, they have not amended the complaints to allege that each class member had a claim in excess of $10,000 when these actions were filed.[14]

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[12] Plaintiffs have defined "friable" asbestos-containing material as material which, when dry, may be crumbled or pulverized by hand pressure, or is "otherwise easily damaged." App. 92a.

[13] The district court has ruled that notice of the class redefinition need not be sent to the class members, thus further complicating the task of deciding which plaintiffs purport to be before the court.

[14] Even as redefined, the class apparently continues to include those who cannot properly invoke diversity jurisdiction. At oral argument before the court of appeals, plaintiffs' counsel would say only that "virtually" all of the members of the new class could make the necessary allegation. *See* App. 130a.

REASONS FOR GRANTING THE PETITION

There should be no question that the court of appeals committed error in this case. In allowing the district court to ignore facial jurisdictional defects, and to enter rulings on the merits of plaintiffs' claims before correcting those defects, the decision below runs counter to a long line of cases from this Court that establishes that each plaintiff who seeks to invoke the diversity jurisdiction of a federal court must allege facts that, if true, would authorize the exercise of that jurisdiction. Because a pleading can only have value if it is made at the outset of the case, a ruling that allows the deferral of an attack on the pleading is, in effect, a ruling that a jurisdictional allegation is no longer required.

The pleading requirement is more than a technical nicety. As a threshold matter, the decision to postpone a ruling on jurisdiction until trial severely prejudices the petitioners. If no pleading is required, plaintiffs are under no obligation to identify those class members who are properly before the district court. Consequently, should the case be resolved before the "damage phase" of trial—through settlement or a ruling in defendants' favor—and thus before the improper class members are identified, defendants may have no way to bind any unnamed class member to that ruling. A decision that allows plaintiffs to participate in a victory but to escape the binding effect of a defeat should not be allowed to stand.

Equally troubling are the institutional consequences that will flow from the court of appeals' decisions. By allowing the district court to proceed in the face of a deficient allegation, the court below has permitted the district court to act as a court of general jurisdiction: it may assume that it has authority over all the claims raised, dismissing only those that are proved deficient at some point before final judgment. Even if the district court had followed this procedure here (and it did not), such a scheme is flatly inconsistent with the case law of this Court. Given this, and given that the rationale of the decision below is not limited to class actions, the

opinions will lead to a significant broadening of federal court authority over state law claims.

The court of appeals also erred in holding that class action plaintiffs are uniquely exempt from the complete diversity requirement of 28 U.S.C. § 1332. The proper application of this requirement to class actions is an important question of federal law that has not been, but should be, resolved by this Court. The "limited diversity" rule endorsed by the court below for Rule 23 actions is inconsistent with the Rules Enabling Act, 28 U.S.C. § 2072, and the case law of this Court, and cannot be justified by any considerations of litigation efficiency. This Court should decide whether such an exception to traditional jurisdictional principles exists.

More broadly, what is at stake in this case is the role of nationwide, diversity-based class actions in federal courts. In refusing to require plaintiffs to identify those who are properly before the court, and in adopting a special class action exception to the diversity rules, the court of appeals has distorted traditional jurisdictional rules to accommodate the perceived needs of plaintiffs in cases such as this. Whether class actions require or warrant this special treatment, and more importantly, the extent to which federal jurisdiction can be stretched to encompass such cases, are issues sufficiently important to warrant further review.

I. THE COURT OF APPEALS HAS GIVEN DISTRICT COURTS DISCRETION TO EXERCISE SUBJECT MATTER JURISDICTION OVER DIVERSITY CLAIMS EVEN IN THE ABSENCE OF ANY FACTUAL ALLEGATION SUFFICIENT TO INVOKE THAT JURISDICTION.

The court of appeals erred in allowing the district court to postpone a ruling on its own jurisdiction. This error can be seen by applying three well-settled legal principles.

First, a plaintiff who seeks to invoke diversity jurisdiction has an affirmative duty to set forth facts in the

complaint that, if true, would satisfy the requirements of 28 U.S.C. § 1332. This Court has held without exception that "[i]t is incumbent upon the plaintiff properly to allege the jurisdictional facts," and that the plaintiff "must allege in his pleading the facts essential to show jurisdiction." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936). *See also Carden v. Arkoma Associates*, 110 S. Ct. 1015, 1021 (1990) (the rule "'is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and . . . that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record'") (*quoting Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)). *Cf. Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) ("The first thing a federal judge should do when a complaint is filed is check to see that federal jurisdiction is properly alleged"). This requirement is codified in Rule 8 of the Federal Rules:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . .

Fed. R. Civ. P. 8(a)(1).

Second, until the necessary pleading has been made, it is presumed that the district court *lacks* subject matter jurisdiction. *See Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) ("A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears"); *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487, 492 & n.9 (D.C. Cir. 1984). *See also Turner v. President, Directors and Company of the Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799). In short, an adequate jurisdictional pleading is the "key that unlocks the door" to the federal courthouse.

Third, this Court has squarely held that in a diversity-based class action such as this, *each* class member must

independently present a "matter in controversy" within the meaning of 28 U.S.C. § 1332; the plaintiffs may not aggregate the value of their respective claims. Any class member who fails to present the requisite matter in controversy must be dismissed. *See Zahn*, 414 U.S. at 301. *See also Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939) ("each separate controversy must be of the requisite amount to be within the jurisdiction of the district court").

Given these principles, the ruling below is clearly wrong. The allegation that "all members of the class (*except a minimal portion thereof*) have claims in excess of $10,000" (App. 91a (emphasis added)), fails to satisfy *Zahn*'s requirement that *each* class member have a sufficient amount in controversy. Not only do the complaints concede that some plaintiffs are not properly in federal court, they also fail to identify which class members *could* make a sufficient allegation. As a result, a proper pleading has not been made on behalf of *any* unnamed class member; this should have led the lower courts to dismiss the claims, or at least refrain from adjudicating these claims until a sufficient allegation was made. *See Zahn, supra; Clark v. Paul Gray, supra.* Otherwise, the district court would be proceeding on the mere *assumption* that jurisdiction was proper, something it plainly may not do.

An example may illustrate the danger of the approach used by the lower courts. Suppose the defendants in a class action either settle with the class as a whole (subject to the district court's approval), or prevail on a pretrial motion for summary judgment. Normally, each plaintiff would be bound by the result, and the defendants would have an obvious *res judicata* defense should a class member later try to bring an individual action. Because class membership is typically established either by identifying each member or by objective criteria (*e.g.*, "all individuals who purchased XYZ stock during 1983"), it is possible to know who will be bound by a judgment, regardless of whether the case is resolved

at or prior to trial. In this case, however, the proper class members have not been identified, and there are no objective means to determine who had an insufficient claim at the time the complaints were filed. Thus, a class member who is unhappy with any pretrial resolution can file a subsequent action, arguing that it was never a proper plaintiff in the class action, and cannot be bound by a ruling of a court that had no jurisdiction over its claims.[15] The unnamed class members are thus free to "wait and see": if the decision at trial is favorable, they can participate in the rewards; if the ruling is adverse, they have an opportunity to pursue a separate action on the same claim.[16]

This problem, known as the "one-way intervention" phenomenon, was intended to be eliminated by the 1966 amendments to Rule 23. *See* Fed. R. Civ. P. 23(c)(3) advisory committee note. *See also American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 545-47 (1974) (describing problem). The opinion in this case has brought the problem back to life.

The impact of the opinions below extends far beyond the effect on the individual defendants, however. In

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[15] The later, individual actions would not be limited to claims of $10,000 or less. Nothing would prevent a class plaintiff from claiming that although it did not have a sufficient amount in controversy at the time the class action complaints were filed, its claim has increased in value since that time.

[16] In theory, the district court could schedule individual damage hearings to be held *after* defendants prevail to determine who will be bound by the judgment. Petitioners submit, however, that it is inconceivable that tens of thousands of class plaintiffs will travel to Pennsylvania to put on evidence of the size of the claim that they could have alleged in 1983, for the sole purpose of establishing that these claims are now extinguished by the judgment. Even if these hearings were feasible, there is no possible justification for putting the litigants to the expense and risk of this procedure simply to avoid the requirement of an adequate pleading.

Nor should defendants be required to wait until a later action is filed to determine the scope of any judgment in the current case. The difficulties of proving, years later, what a plaintiff "could have alleged" in an earlier class action may well be insurmountable.

allowing the district court to postpone a ruling on facial jurisdictional attacks, the decision below: (a) has effectively ruled that the pleading requirement itself may be ignored; (b) has distorted the Rules of Civil Procedure in a way that permits a significant and unwarranted extension of federal subject matter jurisdiction; and (c) will impose significant institutional costs on the federal court system. Individually or collectively, these problems justify further review by this Court.

First, the clear import of the decisions below is that the traditional pleading requirement is now discretionary, rather than mandatory. Although the court of appeals did not say so directly, its rationale allows no other conclusion.

The court held that Rule 12(d) permits a district court to defer until trial the resolution of its own jurisdiction. In the context of a challenge to the adequacy of the pleadings, however, the discretion to defer is no different from the discretion to eliminate. There simply is no justification for allowing deferral in these circumstances, because the passage of time cannot make an allegation more or less adequate. There are no facts to be resolved, and no evidence that needs to be gathered; all that is required is a review of the complaints. Moreover, there would be little benefit to addressing the *pleading* requirement once the trial has begun and evidence of actual damage has been presented.[17]

More importantly, to defer review of the jurisdictional adequacy of a pleading is to vitiate its role in federal practice as the "key" to the federal courthouse door. Because a pleading is the *only* means by which jurisdiction is invoked, a deferral of this requirement means that the

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[17] The court of appeals' rationale is further undercut by 28 U.S.C. § 1332(b), which provides that when a plaintiff fails to prove at trial that its claim was in excess of $10,000, costs may be imposed. But the district court does not lose jurisdiction as a result. This section makes clear Congress's understanding that the amount alleged and the amount proved are separate requirements.

district court need not fulfill its "independent obligation to police the constitutional and statutory limitations on [its] jurisdiction." *Minority Police Officers Ass'n of South Bend v. City of South Bend*, 721 F.2d 197, 199 (7th Cir. 1983). *See also Carden*, 110 S. Ct. at 1021. If a proper pleading need not be made until after the court has already exercised jurisdiction, there would be little purpose in having the requirement at all. Thus, while the court of appeals may not have eliminated the pleading requirement in form, it has done so in substance.

Second, the opinions below have distorted the Rules of Civil Procedure. The court of appeals simply ignored Rule 8(a), which provides that the complaints "shall" set forth a "short and plain statement" of the grounds on which federal jurisdiction rests. The failure to require such a pleading at some point prior to trial not only violates this Rule, but also conflicts with decisions of this Court such as *Clark*, *supra*, and *McNutt*, *supra*. The court of appeals neither cites Rule 8(a), nor makes any effort to mitigate the obvious implication of its opinions that district courts have the authority to waive the requirement of that Rule.

The court of appeals also misconstrued Rule 12(h)(3), which provides that "whenever it appears . . . that the court lacks subject matter jurisdiction, . . . the court *shall* dismiss the action" (emphasis added). In an effort to square Rule 12(h)(3) with its conclusion that Rule 12(d) confers the power to delay the dismissal of insufficient claims, the court of appeals concluded "that Rule 12(h)(3) invests the district court with the *power* to dismiss the action, [while] Rule 12(d) discloses *when* this power may be exercised." App. 14a (emphasis in original). This interpretation is untenable. Two hundred years of practice demonstrates that a federal court does not need a rule of procedure to give it the "authority" to dismiss cases that are not within its jurisdiction. The belief that Rule 12(h)(3) is no more

than a grant of authority also reads the words "whenever" and "shall" out of the Rule.[18]

The decision below has thus held that even when it "appears" from the complaint that jurisdiction is lacking, Rule 12(d) grants a federal court the discretion to exercise some kind of "interim" authority over the action until it decides to resolve the jurisdictional challenge. Not surprisingly, neither the court of appeals nor the district court identified the source of this interim jurisdiction, other than the purported authority under Rule 12(d). This novel construction of the Federal Rules—and the resulting expansion of the district court's jurisdiction—should be reviewed by this Court.

The court of appeals' reliance on *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988), does not change the analysis. In *Sterling*, it had been specifically alleged that each of the plaintiffs had a jurisdictionally sufficient claim. *See id.* at 1195. The Sixth Circuit only addressed whether the trial judge was required to make an immediate *factual* determination of which plaintiffs could not justify that allegation. *Id.* at 1195-96. The decision is therefore irrelevant to the questions presented in this petition.

Third, the distortion of § 1332 and the Federal Rules imposes significant institutional costs on the federal court system. By making it unnecessary to plead jurisdiction, the court of appeals has expanded the district court's authority to consider and resolve questions of purely state law. The current actions dramatically illustrate the point. Even prior to the court of appeals' rulings, the district court had entered summary judgment against some plain-

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[18] Even a minimal attempt to harmonize Rule 12(d) and Rule 12(h)(3) would show that while Rule 12(d) may allow deferral of jurisdictional challenges involving disputed *facts*, Rule 12(h)(3) requires *prompt* dismissal whenever it "appears" that the court lacks jurisdiction. Properly understood, Rule 12(h)(3) is not a grant of power, but an affirmation that a federal court has no power to do anything *other* than dismiss an action whenever it "appears" that jurisdiction is lacking.

tiffs in Hawaii, Georgia, and Virginia on non-jurisdictional grounds. In each instance, the district court interpreted and applied state law, without having decided that it had the constitutional or statutory authority to resolve the claims presented.[19]

The court of appeals understood that this would be the effect of its decision, and sanctioned the result. If there were any lingering doubts on this point, the companion opinion concerning the LAQ settlement laid them to rest. *See* App. 45a. Having just decided that the jurisdictional question could be postponed until trial, the court of appeals proceeded to *affirm* a final judgment that dismissed with prejudice the claims of all class members against LAQ, *without determining which claims were properly before the district court.* The district court had simply assumed jurisdiction to dispose of all plaintiffs' claims, and the court of appeals affirmed that assumption of authority without further inquiry.[20]

Petitioners are not aware of any other case in which a federal court, when presented with both an admittedly inadequate pleading and an absence of proof that jurisdiction was proper, has refused to dismiss state law

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[19] *See* App. 93a-98a (Virginia summary judgment order); App. 99a-103a (Georgia); App. 104a-113a (Hawaii). The district court has made other rulings regarding its power over the parties, without making the necessary finding that the affected plaintiff's claims were within its jurisdiction. For example, it has issued an injunction that prohibits an Ohio school district from proceeding in Ohio state court against one of the defendants. *See* App. 114a-118a. The Ohio school district has never alleged that it was properly in federal court.

[20] The court of appeals' failure to resolve the jurisdictional issues in the LAQ appeal does not comport with this Court's directive in another case involving the lack of jurisdictional analysis by the Third Circuit:

> every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it.

Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986) (citations omitted).

claims. The result of the opinions below is that the court of appeals has allowed the district court to proceed as a court of general, rather than limited, jurisdiction. A plaintiff need no longer use a key to open the federal courthouse door, because the door is already open: the district court can now *presume* it has the authority to resolve claims until proof to the contrary is presented. It hardly needs repeating that such a presumption cannot be reconciled with the decisions of this Court. *See, e.g., Bender v. Williamsport Area School District*, 475 U.S. 534 (1986); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

The assumption of jurisdiction to consider state law claims raises serious federalism concerns. The district court in these class actions will be called on to make rulings and interpretations of state law for each of the 50 states.[21] Some of these rulings will be made on unsettled issues of state common law, which may well call for policy judgments on how distant states would balance competing interests under particular causes of action.[22] This is precisely the kind of case in which federal courts should be most vigilant about the limits of their own jurisdiction and the interests of the states. The court of appeals' decision not only allows, but invites, the extension of federal authority over these claims.

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[21] The Rules of Decision Act, 28 U.S.C. § 1652, requires the district court in this case to apply Pennsylvania choice-of-law analysis. The district court has concluded that this analysis requires the application of the law of the state where each plaintiff resides. *See generally Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

[22] One egregious example of this problem involves the claims by the Hawaii schools. Certain defendants moved for summary judgment against those schools on the basis of the Hawaii statute of repose. In response, the Hawaii Attorney General claimed that the statute of repose violated the Hawaii and U.S. Constitutions. Given this difference of opinion between the Hawaii legislature and the Hawaii executive branch on the validity of a Hawaii statute, it is hard to believe that a federal judge sitting in Pennsylvania is the decision maker best suited to resolve this disagreement. The district court rejected Hawaii's attack on its own statute. *See* App. 109a-111a.

This issue should be addressed now, because it is not likely to survive until a post-trial appeal. The greatest risk to the defendants on this point occurs if they prevail at trial. At that point, defendants will still be unable to determine who is bound by the judgment, but because they have "won" the case, would likely have no further right of appeal. Conversely, if plaintiffs prevail at trial, and present individual evidence of the amount of damages, the pleading issue may disappear if plaintiffs are given leave (even after trial) to amend their allegations to show jurisdiction. *See* 28 U.S.C. § 1653. In short, unless the Court determines now whether a threshold requirement of an adequate jurisdictional pleading applies in these cases, it may never have the opportunity to do so.

At root, the question presented is a simple one: whether a federal court has the authority to proceed in an action where there has been no allegation that subject matter jurisdiction is proper, and indeed, where the pleadings demonstrate the contrary. This Court should grant review to correct the problems created by the opinion below, and to prevent the lower courts from exceeding their constitutional and statutory authority.

II. THE COURT OF APPEALS HAS ADOPTED A "CLASS ACTION EXCEPTION" TO THE TRADITIONAL REQUIREMENT OF COMPLETE DIVERSITY.

The second requirement of the federal diversity statute is that the matter in controversy be between citizens of different states. 28 U.S.C. § 1332. The question is whether *each* plaintiff in a class action must satisfy this statutory requirement, or whether it is sufficient that only the named plaintiffs are diverse.

Since the Judiciary Act of 1789, the federal statute authorizing diversity jurisdiction has been interpreted to require "complete" diversity between all plaintiffs and all defendants; that is, the citizenship of each plaintiff must be different from the citizenship of each defendant

from whom that plaintiff seeks recovery. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *See also Carden*, 110 S. Ct. at 1017. Thus, for example, if a Pennsylvania plaintiff sues several defendants under state law, diversity is lacking if even one defendant is a Pennsylvania citizen, and the federal court normally would have no authority to proceed in such a case.

It is undisputed that each of the current cases includes plaintiffs asserting claims against defendants who are citizens of the same state.[23] Nevertheless, the court of appeals concluded that when an action is brought under Rule 23, the plaintiffs need show only "limited" diversity, *i.e.*, diversity between the *named* plaintiffs and each defendant. App. 15a-19a. This purported "Rule 23 exception" to the traditional diversity rules is a substantial one, and is inconsistent with this Court's holdings. In addition, such an exception is precluded by Congress's directive in the Rules Enabling Act that the Federal Rules of Civil Procedure may not be used to expand the jurisdiction of the federal courts. *See* 28 U.S.C. § 2072.[24]

The critical language in § 1332 is that the "matter in controversy" must be between citizens of different states. In *Zahn v. International Paper Co.*, the Court interpreted the phrase "matter in controversy" to refer to *each* action by *each* plaintiff pursuing a separate claim, even where joinder was achieved under Rule 23(b)(3). *See* 414 U.S. at 292-301. Although *Zahn*'s holding was that each plaintiff must independently satisfy the amount in controversy prong of § 1332, nothing in the opinion suggests that the interpretation of the phrase

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[23] Petitioners U.S. Gypsum and Fibreboard Corp. are citizens of Delaware, petitioner Kaiser Gypsum is a citizen of California, and petitioner W.R. Grace is a citizen of Connecticut. *See* App. 88a-90a. Each of the consolidated class actions includes school districts in Delaware, California, and Connecticut as unnamed plaintiffs.

[24] The statute provides that the "rules of practice and procedure . . . for cases in the United States district courts . . . shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a), (b). *See also* Fed. R. Civ. P. 82.

"matter in controversy" should change where the plaintiffs fail to satisfy the complete diversity requirement of the statute. *Cf. Russo v. Texaco Inc.*, 808 F.2d 221, 227 (2d Cir. 1986) ("When the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place"). Accordingly, since each plaintiff in a 23(b)(3) class action must independently allege a $10,000 (now $50,000) "matter in controversy," it logically follows from *Zahn*'s interpretation of § 1332 that each plaintiff must also demonstrate that the "matter in controversy" is between citizens of different states.

Given that each class member in this case cannot *independently* satisfy the jurisdictional requirements of § 1332, there are only two possible explanations for the result reached by the court of appeals. First, it might have concluded that the non-diverse class members may proceed in federal court as "pendent parties." Second, the court might have relied on a purported "class action exception" to the statutory requirement of complete diversity.

This Court's opinions make clear that pendent party jurisdiction is not available here. *Zahn* squarely rejected the argument that an unnamed class member who did not individually present a "matter in controversy" within the meaning of § 1332 could proceed in a Rule 23(b)(3) class action by appending its claims to those of another plaintiff. 414 U.S. at 295. In addition, in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), the Court ruled (in a case that was not a class action) that a plaintiff normally may not avoid the requirement of complete diversity through the use of ancillary jurisdiction over non-diverse parties. *Id.* at 375-77. *See also Aldinger v. Howard*, 427 U.S. 1 (1976) (pendent party jurisdiction not available for civil rights actions under 28 U.S.C. § 1343). More recently, the Court has again rejected the view that parties that could not themselves invoke the district court's jurisdiction might nonetheless have their state law claims considered:

> All our cases—*Zahn*, *Aldinger*, *Kroger*—have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretive rule . . . .

Finley v. United States, 109 S. Ct. 2003, 2010 (1989).[25]

It therefore comes as no surprise that the court of appeals did not base its ruling on a theory of pendent party jurisdiction. *See* App. 11a ("we need not reach [the] claim of lack of pendent party jurisdiction"). In fact, plaintiffs themselves have disavowed reliance on pendent party theories to support the district court's jurisdiction.[26] *See* App. 132a.

Because each class member cannot allege an independent basis for jurisdiction, and because pendent party jurisdiction is not available, there remains only one explanation for the court of appeals' ruling: the court has adopted a special jurisdictional rule for class actions. It has concluded that when claims are joined under Rule 23 of the Federal Rules (rather than Rule 20, for ex-

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[25] The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, which applies only to actions filed after December 1, 1990, authorizes pendent party jurisdiction (referred to in the Act as "supplemental" jurisdiction) in some circumstances. Although the Act was apparently directed in part to this Court's decision in *Finley*, *supra*, the legislative history indicates that the Act is not intended to affect the jurisdictional requirements for diversity-only class actions. *See* H.R. Rep. 101-734, at 29 (Sept. 10, 1990).

[26] If the court of appeals had considered the availability of "pendent party" jurisdiction, it would have been compelled to decide whether such jurisdiction could be constitutionally allowed here, where the plaintiffs' claims arise from different transactions different times, involving different buyers and different sellers, and involving different products with different characteristics. The constitutional question in pendent party analysis is whether the claims "derive from a common nucleus of operative facts," and are so related that a plaintiff "would ordinarily be expected to try them in one judicial proceeding." *See Owen*, 437 U.S. at 371 (*quoting United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

ample), non-diverse plaintiffs who raise state law claims may have those claims heard in federal court. This rule-driven exception creates a significant expansion of the district court's subject matter jurisdiction.

To be sure, other federal courts have embraced this class action exception. *See In re Agent Orange Products Liability Litigation*, 818 F.2d 145 (2d Cir.), *cert. denied*, 484 U.S. 1004 (1987); *Pirrone v. North Hotel Associates*, 108 F.R.D. 78, 83 n.2 (E.D. Pa. 1985). *See also F. & H.R. Farman—Farmaian Consulting Engineers Firm v. Harza Engineering Co.*, 882 F.2d 281, 284 (7th Cir. 1989) (*dicta*).[27] These cases, like the court of appeals here, found authority for this class action exception in the Court's pre-*Zahn* opinion in *Snyder v. Harris*, 394 U.S. 332 (1969). In *Snyder*, the Court said in *dicta*:

> Under current doctrine, if one member of a class is of diverse citizenship from the class opponent and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same state as the defendant. . . . *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

Id. at 340.[28]

With all due respect to the Court in *Snyder*, the description of the "current doctrine" in 1969 was some-

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[27] The dissenting opinion in *Carden v. Arkoma Associates* also recognized the "*Snyder* rule," although the issue was not presented in that case. *See* 110 S. Ct. at 1023 (O'Connor, J., dissenting). The dissent indicated, however, that the basis for this "rule" was pendent party jurisdiction, as suggested by its citation to *Owen Equipment & Erection Co. v. Kroger, supra*. In any event, the *Carden* dissent advocated a "real party in interest" analysis to determine which plaintiffs must be diverse for jurisdictional purposes. 110 S. Ct. at 1024. Under this view, it seems clear that the citizenship of each member of a Rule 23(b)(3) class action would have to be considered.

[28] The issue before the Court in *Snyder* was whether class action plaintiffs could aggregate their claims to reach the required jurisdictional amount. Applying the same rule for class plaintiffs as for nonclass plaintiffs, the Court ruled that they may not.

what overstated: specifically, the law with respect to "permissive joinder" ("spurious") class actions prior to the 1966 Amendments to the Federal Rules was at best unclear.[29] The only case that *Snyder* relied on in support of its description was *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), *overruled on other grounds*, *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1942). *Ben-Hur*, however, did not hold that jurisdictional statutes are to be interpreted differently in class actions than in other cases. Instead, *Ben-Hur*, relying on an established line of cases not unique to class actions, determined that a district court may in some circumstances have *ancillary* jurisdiction to resolve the claims of plaintiffs who could not independently satisfy the jurisdictional requirements. *See* 255 U.S. at 366. *See also Aldinger*, 427 U.S. at 11 (describing *Ben-Hur* as an ancillary jurisdiction case).

Thus, the "doctrine" that properly flows from *Ben-Hur* is not that class action plaintiffs are the beneficiaries of some unique rule of fictional citizenship, but only that for certain claims in certain cases (*e.g.*, the claims of all claimants to a common fund), the doctrines of pendent and ancillary jurisdiction may permit non-diverse plaintiffs to have their state law claims resolved in federal court. As discussed above, pendent party jurisdiction is not available here, and thus the non-diverse plaintiffs are not properly before the district court.

Contrary to the court of appeals' belief, petitioners' view of the law does not require a finding that *Finley* "overruled *Snyder* sub silentio." *See* App. 17a. *Snyder*

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[29] *Compare Wagner v. Kemper*, 13 F.R.D. 128, 129 (W.D. Mo. 1952) *and Steele v. Guaranty Trust Co.*, 161 F.2d 387, 388 (2d Cir. 1947), *cert. denied*, 333 U.S. 843 (1948), *with Shipley v. Pittsburgh & Lake Erie R. Co.*, 70 F. Supp. (W.D. Pa. 1947). Indeed, this Court granted certiorari to address the issue in 1956; however, the case was resolved by the parties after argument, while the case was under submission. *See Amen v. Black*, 234 F.2d 12 (10th Cir.), *cert. granted*, 352 U.S. 888 (1956), *remand on motion of the parties*, 355 U.S. 600 (1958).

did not purport to announce a holding on "limited diversity" jurisdiction in class actions; it only purported to make an observation about what was "current doctrine" in 1969 regarding pendent party jurisdiction, an issue that was not before the Court. *Finley* is the latest in a series of cases, beginning with *Zahn*, that explains "current doctrine" today as to when pendent party jurisdiction should be available. This line of cases limits *Ben-Hur* to a narrower range of facts, but does not necessarily reverse *Ben-Hur* itself. *But cf.* 1 J. Moore, *Moore's Federal Practice* ¶ 0.97(5), at 968-69 n.8 (1990) ("The holding in *Zahn* apparently overrules, *sub silentio*, Supreme Tribe of Ben Hur v. Cauble [citation omitted], which held that the nonappearing members of the class are within the Court's ancillary jurisdiction for diversity purposes"). *See also* Perdue, *Finley v. United States: Unstringing Pendent Jurisdiction*, 76 Va. L. Rev. 539, 562-63 (1990) ("Even if *Ben-Hur* survived *Zahn*, it is hard to see how it can survive *Finley*. . . . [I]t seems likely that *Finley* marks the end of ancillary jurisdiction over nondiverse class members" (footnote omitted)). To the extent this line of cases limits *Ben-Hur*, it likewise limits the validity of *Snyder*'s reliance on *Ben-Hur*.

The court of appeals apparently believes that *Snyder* intended to create an exception to the "complete diversity" rule of *Strawbridge v. Curtiss*, *supra*. The importance of this issue is obvious. Under the court of appeals' decision, the limits of federal power over state claims between citizens of the same state can be overcome simply by increasing the number of plaintiffs until the numerosity requirement of Rule 23(a) is met. The scope of the district court's authority is now a matter of artful pleading: as long as the proper joinder device is used (Rule 23), and as long as nondiverse parties are not listed in the caption of the complaint, federal jurisdiction can reach state law claims that would otherwise be left to the state courts. The exercise of this power is plainly inconsistent with the language of § 1332, and is not supported by a careful consideration of the case law. Fur-

ther review by this Court is needed to correct the court of appeals' improper expansion of federal jurisdiction.

Finally, the court of appeals' suggestion that requiring complete diversity would sound the "death knell" for nationwide, diversity-based class actions is both incorrect as a matter of fact and irrelevant as a matter of law. *See* App. 19a. Even under normal principles of complete diversity, plaintiffs from 49 states could still bring a diversity-based class action in federal court against one or more defendants who were citizens of the 50th state. Indeed, there is no inherent barrier to nationwide class actions being filed in state courts, which are at least as well suited to decide state law questions as federal courts. Of course, nationwide class actions that raise a federal question would be unaffected, regardless of the interpretation of § 1332.

More importantly, concerns about the availability of a particular joinder device cannot govern the scope of federal authority. Whether a plaintiff may or may not bring a particular claim in federal court should not depend on whether that plaintiff is joined under Rule 23 rather than some other rule of procedure. The Federal Rules cannot establish the boundaries of federal subject matter jurisdiction, *see* Fed. R. Civ. P. 82, 28 U.S.C. § 2072(b), any more than considerations of convenience or expediency can. As the Court has said:

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity [of actions] may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction."

Aldinger, 427 U.S. at 15 (*quoting Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890, 894 (4th Cir. 1972)).[39]

[39] Although not directly relevant to the questions presented, it should be noted that the jurisdictional aberration sanctioned by the court of appeals also does little to serve the interests of efficiency. Nationwide, diversity-based class actions against multiple defendants still require a district court to instruct on and apply the law of

The question whether "limited" diversity is sufficient in class actions has never been resolved by the Court. This case presents an ideal opportunity to address this important issue.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted,

THOMAS W. KIRBY *
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20019
(202) 429-7000
Attorney for Kaiser Gypsum Company, Inc.

JOHN H. LEWIS, JR.*
PETER BUSCEMI
JOSEPH B.G. FAY
J. GORDON COONEY, JR.
ANDREW D. LEIPOLD
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000
Attorneys for United States Gypsum Company

DENIS MCINERNEY *
ALLEN S. JOSLYN
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for W.R. Grace & Co.

WILLIAM J. O'BRIEN *
NANCY J. GELLMAN
CONRAD O'BRIEN GELLMAN DESTEFANO & ROHN, P.C.
1515 Market Street
16th Floor
Philadelphia, PA 19102
(215) 864-9600
Attorneys for Fibreboard Corporation

* Counsel of Record for this Petitioner

March 4, 1991

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numerous states, and may require hundreds or even thousands of individual "mini-trials" to consider defendant-specific questions of causation, damages, etc.

APPENDICES

APPENDIX A

Filed December 13, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1125

IN RE: SCHOOL ASBESTOS LITIGATION

KAISER GYPSUM, INC.,
Petitioner,

v.

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45,
Respondent.

No. 90-1126

IN RE: SCHOOL ASBESTOS LITIGATION

UNITED STATES GYPSUM COMPANY,
Petitioner,

v.

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, and a Conditionally Certified Class,

Respondents.

No. 90-1185

IN RE: ASBESTOS SCHOOL LITIGATION

FIBREBOARD CORPORATION,
Petitioner,

v.

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, and a Conditionally Certified Class,
Respondents.

No. 90-1199

IN RE: ASBESTOS SCHOOL LITIGATION

W. R. GRACE & CO.,
Petitioner,

v.

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, and a Conditionally Certified Class,
Respondents.

Consolidated Petition for a Writ of Mandamus or Prohibition to the Honorable James McGirr Kelly, United States District Court for the Eastern District of Pennsylvania

(D.C. Civil Master File No. 83-0268)

Nos. 90-1125, 90-1126 & 90-1185
Argued: September 19, 1990
No. 90-1199 Submitted under
Third Circuit Rule 12(6):
September 19, 1990

Before: SCIRICA, COWEN and ALDISERT,
Circuit Judges.

(Filed December 13, 1990)

DANIEL J. RYAN, JR., ESQ.
MARSHALL, DENNEHEY,
WARNER, COLEMAN
& GOGGIN
1515 Locust Street
Philadelphia, PA 19102

PATRICK J. HAGAN, ESQ.
KINCAID, GIANUNZIO, CAUDLE
& HUBERT
200 Webster Street, Suite 200
Oakland, CA 94604-0828

Attorneys for Petitioner,
Kaiser Gypsum Co. Inc.

JOSEPH B. G. FAY, ESQ.
(Argued)
J. GORDON COONEY, JR., ESQ.
JOHN H. LEWIS, JR., ESQ.
ANDREW D. LEIPOLD, ESQ.
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

Attorneys for Petitioner
U.S. Gypsum Co.

WALTER R. MILBOURNE, ESQ.
TIMOTHY W. CALLAHAN, II., ESQ.
FRANK M. D'AMORE, ESQ.
SAUL, EWING, REMICK & SAUL
3800 Centre Square West
Philadelphia, PA 19102

Attorneys for Petitioner,
Fibreboard Corporation

DENNIS MCINERNEY, ESQ.
ALLEN S. JOSLYN, ESQ.
CAHILL, GORDON & REIDEL
80 Pine Street
New York, NY 10005

Attorneys for Petitioner,
W. R. Grace & Co.

DAVID BERGER, ESQ. (Argued)
HAROLD BERGER, ESQ.
WARREN D. MULLOY, ESQ.
THOMAS F. HUGHES, ESQ.
BERGER & MONTAGUE
1622 Locust Street
Philadelphia, PA 19103

DANIEL A. SPEIGHTS, ESQ.
SPEIGHTS & RUNYAN
304 Lee Avenue
P.O. Box 685
Hampton, SC 29924

HERBERT B. NEWBERG, ESQ.
HARVEY KRONFELD, ESQ.
GERALD E. WALLERSTEIN, ESQ.
SANDRA L. DUGGAN, ESQ.
227 South Sixth Street
Lippincott Bldg., 2nd Floor
Philadelphia, PA 19106

Attorneys for Respondents, Barnwell School District No. 45, School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools, and a Conditionally Certified Class

CHARLES ALAN WRIGHT, ESQ.
727 E. 26th Street
Austin, TX 78705

Of Counsel to Respondents

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

These proceedings arise out of an on-going federal diversity class action, *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986), and require us to decide whether to grant the petitioners' requests for a writ of mandamus or prohibition directing the district court to dismiss the class action complaints for lack of subject matter jurisdiction. Because we conclude that the

petitioners have not met their burden of showing a "clear and indisputable" lack of subject matter jurisdiction over the class, we will deny the consolidated petitions for a writ of mandamus in Nos. 90-1125 and 90-1185, and the petition for a writ of prohibition in No. 90-1126. We also consolidate with these petitions W. R. Grace & Co.'s petition for a writ of prohibition in No. 90-1199, and will deny it as well.

I.

On January 17, 1983, the class action giving rise to these petitions was filed in the district court on behalf of a national class consisting of all public and private elementary and secondary schools throughout the country. The complaints alleged claims against approximately fifty manufacturers and producers of asbestos-containing materials, which purportedly were used in the construction of some of the class plaintiffs' school buildings. On September 28, 1984, the district court certified the class action pursuant to F.R.Civ.P. 23(b)(3), and we affirmed the class certification on May 1, 1986. *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). In 1989, several defendant manufacturers requested the dismissal of the federal class action of certain unnamed members on the basis that (1) not every class member has a claim in excess of the $10,000 jurisdictional amount; (2) complete diversity of citizenship between all absent class members and all defendants is required in a diversity-based class action; and (3) asbestos property damage claims are "local actions" involving real estate and may only be brought in the state where the real estate is located. After briefing and oral argument, the district court issued Pretrial Order No. 191 on May 1, 1989, directing the class plaintiffs to amend their complaints to conform with 28 U.S.C. § 1332(a). The plaintiffs accordingly amended their complaints to allege an amount in controversy of $10,000 for each plaintiff class member except a hypothetical small

number of school districts, not yet identifiable, that only have asbestos inspection costs under $10,000. The complaints also averred that the citizenship of each named class representative was diverse from that of each defendant manufacturer.

On November 15, 1989, after several defendants had filed challenges to the amended complaints, the district court issued Pretrial Order No. 197 in which it declined to dismiss the class action for lack of subject matter jurisdiction. In its memorandum and order, the district court observed that *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), requires dismissal of only those class members who fail to meet jurisdictional amount requirements. Because those plaintiffs could not be readily determined, the district court concluded that "[a]ny potential jurisdictional problems raised in this case can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000." App. at 2-3. The district court also determined that complete diversity between all class members and all defendants is not required, and that the "local action" doctrine is inapplicable to the asbestos property damages claims in this class action. App. at 4-6.

After the district court refused to certify Order No. 197 for interlocutory review under 28 U.S.C. § 1292(b), two defendant manufacturers, Kaiser Gypsum Company, Inc. (No. 90-1125) and Fibreboard Corporation (No. 90-1185), filed petitions for a writ of mandamus directing the district court to dismiss the pending complaints and to refrain from any adjudication on the merits until the plaintiffs have cured all jurisdictional defects. A third defendant, United States Gypsum Company, filed a petition for writ of prohibition (No. 90-1126), in which W. R. Grace & Co. joined (No. 90-1199), seeking similar relief. These are the four petitions consolidated before us.

II.

Federal courts have the power to issue writs of mandamus or prohibition under the All Writs Act, 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." That two petitioners in this case have requested a writ of mandamus and two have requested a writ of prohibition is unimportant; it does not affect the relief requested. Although a writ of mandamus may appear more appropriate when the request is for an order mandating action, and a writ of prohibition may be more accurate when the request is to prohibit action, modern courts have shown little concern for the technical and historic differences between the two writs. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3932 (1977 & Supp. 1990); *see Ex parte Simons*, 247 U.S. 231, 239-40 (1918); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 n.1 (10th Cir. 1982). Under the All Writs Act, the form is less important "than the substantive question [of] whether an extraordinary remedy is available." *In re Davis*, 730 F.2d 176, 181 & n.10 (5th Cir. 1984).

The Supreme Court admonishes federal appellate courts to exercise their writ power with caution. *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976); *see DeMasi v. Weiss*, 669 F.2d 114, 116-17 (1982). Because the remedy is so extreme, courts should invoke it only "in extraordinary situations." *Kerr*, 426 U.S. at 402. Traditionally, federal courts have used the power "only to confine inferior courts to their lawful jurisdiction or to compel them to exercise authority when they have a duty to do so." *DeMasi*, 669 F.2d at 117 (citing *Will v. United States*, 389 U.S. 90, 95 (1967)). In defining "jurisdiction," the Supreme Court has avoided a "narrow and technical" construction, directing that "only

exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will*, 389 U.S. at 95 (quoting *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)).

Two important policy considerations support the concept that writs of mandamus or prohibition should be granted only sparingly. First, mandamus actions " 'have the unfortunate consequence of making the [district court] judge a litigant . . .' in the underlying case." *Kerr*, 426 U.S. at 402 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384-85 (1953)). Second, frequent use of writs of mandamus would ignore the important judicial goal of avoiding piecemeal appellate review. *Kerr*, 426 U.S. at 403; *DeMasi*, 669 F.2d at 117.

To ensure the use of writs in only "extraordinary situations," the Supreme Court has established two prerequisites to the issuance of a writ: (1) that the petitioner have no other "adequate means to attain the [desired] relief," and (2) that the petitioner meet its burden of showing that its right to the writ is "clear and indisputable." *Kerr*, 426 U.S. at 403; *see DeMasi*, 669 F.2d at 117. Once these two prerequisites are met, the court's decision of whether to issue the writ is largely one of discretion. *Kerr*, 426 U.S. at 403.

III.

Although recognizing constraints on the federal courts' writ power, the petitioners argue that mandamus or prohibition generally is appropriate to prevent the district court from acting outside its jurisdictional authority. We agree. Courts traditionally have employed writs to restrain jurisdictional excesses, particularly when a lower court has acted without authority to do so. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). However, mere doubt regarding the trial court's subject mat-

ter jurisdiction is insufficient to invoke a court's writ power. Justice Brandeis, speaking for the Court, has stated:

> If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. If, however, the jurisdiction of the lower court is doubtful . . . or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record . . . or if the complaining party has an adequate remedy by appeal or otherwise . . . the writ will ordinarily be denied.

Ex parte Chicago, R. I. & Pac. Ry., 255 U.S. 273, 275-76 (1921) (citations omitted); *see In re Thornburgh*, 869 F.2d 1503, 1517-18 (D.C. Cir. 1989) ("We do not find the 'clear and indisputable' lack of jurisdiction in the district court . . . that is necessary to warrant a writ of mandamus."). Thus, only if the petitioners show that the district court's lack of subject matter jurisdiction is "clear and indisputable" and that no other adequate means exists to attain relief should we grant the extraordinary relief requested in these petitions.

The petitioners suggest three jurisdictional defects supporting their request for a writ of mandamus or prohibition: (1) not every class member has a claim in excess of the then-applicable $10,000 jurisdictional amount; (2) complete diversity of citizenship between all absent class members and all defendants is required in a diversity-based class action; and (3) asbestos property damage claims are "local actions" involving real estate and may only be brought in the state where the real estate is located. For the reasons stated below, none of these arguments demonstrates the district court's "clear and indisputable" lack of subject matter jurisdiction over the class.

The petitioners also argue that pendent party jurisdiction is not available to the class plaintiffs in lieu of federal diversity subject matter jurisdiction. Because we decide that the petitioners have failed to meet their burden of showing that diversity jurisdiction does not exist, we need not reach their claim of lack of pendent party jurisdiction.

IV.

The petitioners first contend that the class plaintiffs (the respondents) have not met their burden of pleading the $10,000 jurisdictional amount in controversy required under former 28 U.S.C. § 1332(a) (Congress since has amended the statute to require an amount in controversy of $50,000). In their amended complaints, the class plaintiffs concede that a hypothetical small portion of the class will not be able to meet the amount in controversy. However, the petitioners claim that as many as sixty percent of the school districts will not be able to meet the jurisdictional amount because, according to an EPA report, they do not have friable asbestos-containing materials in one or more of their buildings.

It is well established that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case. . . ." *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973). However, as noted in the district court's memorandum and order, *Zahn* does not require that an entire class action be dismissed for lack of subject matter jurisdiction over some of the class members. Rather, the court is required only to dismiss those class members whose claims appear to a "legal certainty" to be less than the jurisdictional amount. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

Because it was not apparent which class plaintiffs should be dismissed, the district court chose to delay dis-

missing any plaintiffs until it is shown *at trial* that their claims do not meet the jurisdictional amount. Relying on F.R.Civ.P. 12(d), the district court noted that "[a]ny potential jurisdictional problems raised in this case [could] be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000." App. at 2-3.

Under F.R.Civ.P. 12(d), a judge who is deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may postpone the decision until trial. The rule specifically provides that a Rule 12(b) motion, "whether made in a pleading or by motion, . . . shall be heard and determined before trial on application of any party, *unless the court orders that the hearing and determination thereof be deferred until the trial.*" F.R. Civ.P. 12(d) (emphasis added).

At this juncture, we are constrained to note how the dissent construes the action of the district court here. It interprets the district court's language, "potential jurisdictional problems . . . be cured *at* trial," to mean *after* trial (emphasis added). Thus, it states that the district court's order purported to " 'cure' the jurisdictional deficiency *after* trial," Dissenting opinion typescript at 4 (emphasis added); to "postpon[e] the resolution of a jurisdiction failure until *after* trial," *id.* (emphasis in original); to defer "resolution of the jurisdictional question until after a trial," *id.* at 9 n.4; to sanction dismissal only "where a plaintiff has failed to establish damages for less than the jurisdictional minimum after trial," *id.* at 12; and to postpone "resolution of jurisdictional questions until after trial," *id.* at 13.

We believe that the dissent's interpretation is both unfair and inaccurate. The district court's language "*cured at trial*" is free from ambiguity and is consistent with the clear authority of Rule 12(d) permitting the jurisdictional decision to be "deferred until the trial."

The Court of Appeals for the Sixth Circuit, in *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988), has considered the effect of Rule 12(d). In *Sterling*, the defendant had filed two separate Rule 12(b)(1) motions seeking pretrial dismissal of the class action because certain representative class plaintiffs did not allege the appropriate amount in controversy. Rather than immediately dismissing any plaintiffs' claims, the district court deferred the jurisdictional decision until trial. The trial judge observed:

> [I]t also seems to me that it is not necessary *at this point* for the court to wholesale order a dismissal of all those potential class members who may not at this point have pleaded, because it seems to me that's a matter that might well come up at some point down the road after the initial phase of the case is tried. . . . *[W]hen you get down to establishing amounts in a case such as this, where there is a jury trial, it puts a burden on the court that the court really doesn't want to undertake*, and that is an assessment of claims at this point to try and make a determination of whether a jurisdictional amount, in fact, can be asserted at this point. . . .

Id. at 1195 n.5 (emphasis added). The appellate court determined that the trial judge's action was not improper. Moreover, the court observed that the "method and timetable" for deciding a Rule 12(b) motion is "left to the *sole* discretion of the trial judge." *Sterling*, 855 F.2d at 1195 (emphasis added).

As noted by the district court, however, only one of the motions to dismiss in this case was a Rule 12(b)(1) motion; the other was premised on Rule 12(h)(3). Thus, even if we apply Rule 12(d) to the 12(b)(1) motion, we still must consider the language in Rule 12(h)(3).

Rule 12(h)(3) provides that subject matter jurisdiction can never be waived: "[w]henever it appears by

suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." However, we find that Rule 12(h)(3) does not require dismissal at this juncture because (1) it is not clear that the district court lacks jurisdiction over the subject matter, and (2) a court does not have to dismiss a claim if the jurisdictional failure can be cured. *See Freistak v. Egger*, 551 F. Supp. 238, 241 (M.D. Pa. 1982); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 169 F. Supp. 774 (D.C. Cal. 1958), *rev'd on other grounds*, 362 U.S. 73 (1960); *see also* 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1393, at 772-73 (1990).

To accept the argument advanced by the petitioners, we would have to conclude that Rule 12(h)(3) nullifies the unequivocal language of Rule 12(d): "The defense[] specifically enumerated (1) . . . in subdivision (b) of this rule [lack of jurisdiction over the subject matter] . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." We do not believe that nullification of Rule 12(d) was Congress's intent in approving the Rule 12(h)(3) submission of the Advisory Committee on Civil Rules. We do not believe also that Rule 12(h)(3) requires the district court to rule immediately upon the presentation of a motion to dismiss; we believe that in *ipsissimis verbis* Rule 12(d) authorizes the district court to defer the hearing and determination.

Because we think that the two provisions must be integrated to provide consistency and be accorded full meaning, we hold that Rule 12(h)(3) invests the district court with the *power* to dismiss the action, and that Rule 12(d) discloses *when* this power may be exercised. Any other interpretation would mean that Rule 12(h)(3) strips away completely the discretionary authority con-

ferred in Rule 12(d) when a lack of subject matter jurisdiction is raised.

Applying Rules 12(d) and 12(h)(3) and the rationale in *Sterling*, we conclude that the district court had the discretionary authority to delay until trial the dismissal of those class members that cannot meet the amount in controversy. Postponing dismissal of such plaintiffs not only appears prudent, but it meshes with our policy. In *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971), we stated that "[i]t is our intention to require removal from the trial list of those 'flagrant' cases where it can be determined in advance 'with legal certainty' that the congressional mandate of $10,000 minimum was not satisfied." *Id.* at 292. This federal class action is not one of those "flagrant" cases. Conceding that some of the class plaintiffs will not meet the jurisdictional amount, the district court is willing to dismiss such plaintiffs once they are identified at trial. We find no abuse of discretion in this approach.

V.

The petitioners next argue that the class must be dismissed due to lack of complete diversity of citizenship. They mount the novel contention that under 28 U.S.C. § 1332(a)(1) the citizenship of each class plaintiff must be diverse from the citizenship of each defendant manufacturer. We reject this argument.

From settled class action cases emerges the precept that in a federal class action only the citizenship of the named class representatives must be diverse from that of the defendants. *Snyder v. Harris*, 394 U.S. 332, 340, *reh'g denied*, 394 U.S. 1025 (1969); *see In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 162 (2d Cir. 1987); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.95, at 23-546 (2d ed. 1987); C. Wright, *Law of Federal Courts* § 31, at 170 (4th ed. 1983); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and*

Procedure: Jurisdiction 2d § 3606, at 424 (1984 & Supp. 1990). What petitioner Kaiser Gypsum Co., Inc. describes in its brief as "dictum in *Snyder v. Harris*," Petitioner's Brief at 23, the Court of Appeals for the Second Circuit describes as "hornbook law, based on 66 years of Supreme Court precedent":

> Although we understand the need to preserve issues for further review, we confess a certain surprise at the vigor with which this argument was pressed in this court and the amount of time that was devoted to it at oral argument. It is hornbook law, based on 66 years of Supreme Court precedent, that complete diversity is required only between the named plaintiffs and the named defendants in a federal class action. 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3606, at 424 (2d ed. 1986) ("[t]he courts look only to the citizenship of the representative parties in a class action"). As the Supreme Court noted in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L.Ed.2d 319 (1969):
>
> > Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 [41 S. Ct. 338, 65 L.Ed. 673] (1921).
>
> 394 U.S. at 340, 89 S. Ct. at 1059. . . . Thus, if appellants' theory of class action jurisdiction is to become law, this must be done by the Supreme Court.

Agent Orange, 818 F.2d at 162. The trial courts in this circuit have not questioned this precept. *Pirrone v. North Hotel Assocs.*, 108 F.R.D. 78, 83 n.2 (E.D. Pa. 1985);

McMahon Books, Inc. v. Willow Groves Assocs., 108 F.R.D. 32, 40 n.5 (E.D. Pa. 1985). Because the complaints in the case before us properly allege that the citizenship of the named class representatives is diverse from that of the defendants, the requisite diversity of citizenship is present.

The petitioners unconvincingly argue that *Finley v. United States*, 109 S. Ct. 2003 (1989), overruled *Snyder* sub silentio. They claim that *Finley* requires complete diversity of citizenship between all class plaintiffs and all defendants in Rule 23(b)(3) class actions. This argument is unimpressive for several reasons.

First, *Finley* does not even address the *Snyder* rule. The only issue before the Court in *Finley* was whether the Federal Tort Claims Act "permits an assertion of pendent jurisdiction over additional parties." *Id.* at 2005. Relying on precedent rejecting pendent party jurisdiction, *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court held that a "grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different *parties*." *Finley*, 109 S. Ct. at 2010 (emphasis added).

At no point did the Supreme Court even allude to the diversity requirement in federal class actions. Surely, if *Finley*'s objective was to overrule *Snyder* by implication and to require complete diversity between all plaintiffs and all defendants in class actions, the Court at least would have made direct or indirect reference to the subject. The Court knows how to state explicitly that a previous decision is no longer to be followed; it knows how to frame a precept in the form of a major premise in which the rules of logic support an implication that a previous holding is threatened; it also knows how to send signals that it will be reconsidering a previous ruling. No such reference to diversity class actions—by ex-

press direction, implication or signal-sending—is present in *Finley*. To suggest that a subliminal message can be found therein, as urged by the petitioners here, is to concoct a fictitious extravaganza that has no place in a serious argument before this court. The petitioners have not submitted a single case supporting their position that *Finley* has obliterated the teachings of *Synder v. Harris*; nor has our independent research discovered any such decision.

Moreover, counsel for United States Gypsum Co. and Kaiser Cement Corp. candidly explained at oral argument the motive behind their argument that *Finley* now requires complete diversity of all members of the class. Counsel stated that the purpose was to destroy nationwide federal diversity class actions:

> THE COURT: [I]f we will accept your subject matter jurisdiction arguments and those of your colleague or your friend who just argued—
>
> MR. KIRBY: Both.
>
> THE COURT: —that what this is actually doing is really virtually precluding class actions in diversity matters?
>
> MR. KIRBY: Nationwide class actions would, we sincerely hope, be dead.

Transcript of Oral Argument at 78-79, *In re Asbestos School Litig.*, —— F.2d —— (3d Cir. 1990) (Nos. 90-1247 & 90-1248). Here we must proceed with caution. It is for the Congress, not the courts, to legislate changes in the diversity laws.

In 1988 Congress reconsidered the diversity jurisdiction of the federal courts. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (partly codified as amended at 28 U.S.C. § 1332). Although the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice

strongly recommended that "virtually all of the Federal court jurisdiction based on the citizenship of the parties" be eliminated, the full Committee on the Judiciary rejected this proposal, suggesting instead that the jurisdictional amount in controversy be raised from $10,000 to $50,000. H.R. Rep. No. 100-889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 5987-88. One of the principal reasons the Committee rejected the complete abolition of diversity jurisdiction was the opposition of key officials responsible for state courts systems. Siegel, *Commentary on 1988 Revision*, in 28 U.S.C. § 1332 (West Supp. 1990). Congress accepted the Committee's compromise and voted merely to raise the amount in controversy. *Id.* Notwithstanding the discussions regarding abolition, Congress did not make any attempt in its 1988 revision to exempt federal class actions from diversity jurisdiction.

The legislative history of 28 U.S.C. § 1332 and the Congressional endorsement of Rule 23(b)(3) class actions manifest Congress's support of diversity-based class actions. If the petitioners wish to sound the death knell on such class actions, their sounding board is the Congress and not this court.

VI.

Petitioner Kaiser Gypsum Company also contends that because the "local action" doctrine applies to any action directly affecting land and real property, the district court's subject matter jurisdiction is limited by the doctrine to claims related to property located in Pennsylvania. The district court rejected this argument, determining that the plaintiffs' claims are "largely tort claims," which are "transitory" rather than "local" in nature.

The law distinguishes between transitory and local actions. Local actions are essentially *in rem* and may only be prosecuted "where the thing on which they are

founded is situated." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3822, at 204-05 (1986) (quoting *Casey v. Adams*, 102 U.S. 66, 67-68 (1880)). A transitory action may be brought wherever venue is proper. *Id.*

The class plaintiffs cite *Dayton Indep. School Dist. v. U.S. Mineral Prods. Co.*, No. B-87-00507-CA (E.D. Tex. Feb. 14, 1989), as authority for their contention that this class action is transitory. In an action involving the same allegations and legal theories as this case, the *Dayton* court held:

> Such claims sound primarily in *product liability and in tort*. The gravamen of Plaintiff's complaint is that the presence of Defendants' products in their buildings poses a health risk to building workers and occupants which must be addressed.
>
> In several years of managing large multi-plaintiff asbestos litigation such as the cases presently before the Court, there has been no occasion to consider title to or possession of any of the buildings which contain the asbestos products at issue, or to resolve any issues involving principles of property law. The parties may use whatever terms they please to describe these cases, but the fact remains that, regardless of the nomenclature used, *these claims are transitory in nature rather than local in nature*. Suits such as these asbestos cases do not involve title to or possession of land such as would be governed by the local action doctrine. Rather, the Plaintiffs are seeking to recover monetary damages arising out of the alleged manufacture and sale of defective products, which "might have taken place anywhere." *The local action rule is not applicable to Plaintiff's claim.*

Id. (emphasis added). The district court in this case conceded in its order that questions relating to the ownership of some of the school buildings may arise later in

the litigation. App. at 6. As an alternative to dismissing the complaints now, the district court determined that it could dismiss those school districts for lack of subject matter jurisdiction once the local action doctrine is shown to apply.

We agree that it is premature to invoke the local action doctrine at this time. Because the alleged claims appear transitory and are not bound to any issues of title or possession of real property, we reject Kaiser Gypsum's local action argument.

VII.

We conclude that petitioners have not met their burden of showing a "clear and indisputable" lack of federal diversity subject matter jurisdiction in this case. Because they have failed to establish this prerequisite to the issuance of a writ, the consolidated petitions for a writ of mandamus or prohibition will be denied.

COWEN, *Circuit Judge*, dissenting.

At issue in these consolidated Fed. R. Civ. P. 23(b)(3) asbestos class action appeals are two fundamental questions of federal jurisdiction. The first is whether a district court has the power to hear a class action suit under its diversity jurisdiction, 28 U.S.C.A. § 1332(a) (1966 & Supp. 1990), when there is substantial and uncontradicted evidence that a majority of the plaintiff class has less than the jurisdictional minimum amount in controversy in direct violation of the rule in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). The district court held that it had the power to hear the cases without dismissing the class members who lacked jurisdictionally sufficient claims as long as it only entered final orders with respect to those claims which after litigation prove to be in excess of the jurisdictional minimum.

The second issue is whether in a class action diversity suit there must be complete diversity between all members of the plaintiff class and all defendants, or whether it suffices for there to be diversity between only named plaintiffs who represent the plaintiff class and all defendants. The district court purported to follow a "well settled rule" which allows a class action to proceed even where complete diversity is lacking, provided that there is complete diversity between named plaintiffs and all defendants.

The majority today holds that the district court was acting within the bounds of its jurisdiction in proceeding to the merits despite the jurisdictional defects. In so holding, the majority breaks new ground in the field of federal jurisdiction. Because I believe that the district court lacks jurisdiction over these consolidated class actions and that the majority's decision today is unsupported by precedent and lacks a theoretical foundation, I must dissent.

I.

All parties to this action agree that every plaintiff in a Rule 23(b)(3) class action must independently satisfy the amount in controversy requirement of section 1332(a) with a claim in excess of the jurisdictional minimum. *Zahn*, 414 U.S. at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'") (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)). Since only the main plaintiffs met the jurisdictional minimum in *Zahn*, the United States Supreme Court would not allow the suit to proceed as a class action. *See also Snyder v. Harris*, 394 U.S. 332 (1969) (separate claims in a class action suit could not be aggregated for the purpose of meeting the jurisdictional minimum amount in controversy requirement). *Zahn* requires that each distinct

claim satisfy the jurisdictional minimum requirement because the Court interprets "matter in controversy" language in 28 U.S.C.A. § 1332(a) as relating to each claim in a class action suit, and not the total amount that might be claimed on the facts giving rise to the class action litigation. *Zahn*, 414 U.S. at 298-300.

All parties to this action agree that some of the represented plaintiffs in this class action do not have claims meeting the jurisdictional minimum amount in controversy contained in former 28 U.S.C.A. § 1332(a).[1] Indeed, plaintiffs have admitted in their amended complaints that some plaintiffs cannot in good faith allege claims in excess of $10,000.[2] Furthermore, defendants

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[1] At the time plaintiffs filed these suits, the statutory authority which empowered federal courts to exercise diversity jurisdiction read:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C.A. § 1332(a) (1966).

[2] On May 30, 1989, after the district court entered Pretrial Order No. 191, which directed plaintiffs to file amended complaints conforming to the requirements of 28 U.S.C.A. § 1332(a), the named plaintiffs amended their complaint to allege:

> The plaintiff and all members of the class (*except a minimal portion thereof*), have claims in excess of $10,000 for costs incurred *inter alia* in the inspection of the school buildings, and all other costs incidental thereto, and costs of repairs and replacement plus punitive damages. *Entities (not now identified) may exist which* own or operate very small school systems in which no friable or potentially friable asbestos-containing material exists and for whom punitive damages may not be re-

have introduced uncontradicted evidence that when this case was filed as much as 60% of the plaintiff class did not have claims exclusive of interest and costs in excess of the jurisdictional minimum.

Notwithstanding the apparently uniform understanding that every plaintiff in a Rule 23(b)(3) class action must independently meet the jurisdictional minimum amount in controversy, and that some plaintiffs in this class action do not meet that requirement, the district court declined to dismiss from the suits plaintiffs whose claims are jurisdictionally insufficient. Instead, the district court concluded that it could "cure" the jurisdictional deficiency after trial by entering judgment on behalf of claims that proved to be in excess of $10,000. As support for this novel approach, the district court cited Rules 12(d) and 12(h)(3). Amazingly, the majority today allows the district court to proceed on that basis. Because there is no authority for postponing the resolution of a jurisdictional failure until *after* trial, I would grant the petition and order the writ of mandamus to issue directing that the amended complaint be dismissed.

At this juncture, I must respond to the majority's criticism that I have unfairly and inaccurately characterized the district court's action respecting the "amount in controversy" question. I state throughout my dissent that the district court has decided to postpone until *after* trial resolution of the jurisdictional questions. Maj. typescript op. at 14. I stand by this characterization.

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coverable who *cannot allege $10,000 in controversy.* (emphasis added).

Defendants have shown that 60% of the plaintiff class cannot meet the jurisdictional minimum. Nor can the plaintiffs inflate their damage allegation by including punitive damages in the amount alleged as being in controversy, since the class was not certified to seek punitive damages or to recover for costs incurred in connection with inspecting for asbestos-containing materials. The class certification was limited to claims for damages arising from actually friable materials.

This class action is certified to resolve the common factual questions that underlie the class members' claims in order to facilitate resolution of asbestos-in-school claims for property damage. Pre-Trial Order No. 235, entered May 17, 1990, identified the following common issues which will be resolved in the first phase of a bifurcated trial:

A. The level at which various kinds of friable asbestos, in various forms, is hazardous in school buildings.

B. Defendants' knowledge of the health hazards of asbestos.

C. Defendants' failure to properly warn or test.

D. Defendants' fraudulent concealment of knowledge of the dangers of asbestos.

E. Defendants' conspiracy to suppress knowledge of the dangers of asbestos.

F. Punitive damages.

G. Common defenses.

Pre-Trial Order No. 235. Resolution of these common factual questions will bring us no closer to determining which plaintiffs must be dismissed because they have jurisdictionally insufficient claims.

Indeed, the district court expressly stated in Pre-Trial Order No. 235 that "Determination of the conduct of any additional phase(s) shall be deferred until the completion of Phase I." Pre-Trial Order No. 235. In other words the identity of the plaintiffs who must be dismissed because they lack jurisdictionally sufficient claims will be deferred until *after* a trial resolving the common factual questions.

A.

Rule 12(d) allows a court to defer until trial certain Rule 12(b) dismissal motions, including a Rule 12(b)(1)

motion to dismiss for lack of subject matter jurisdiction. Rule 12(h)(3) states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

The argument the district court apparently accepted is that it does not appear the court lacks subject matter jurisdiction until a trial on damages demonstrates damages do not exceed the jurisdictional minimum. Hence, the district court can defer resolution of the jurisdictional question until it has enough information to reach a supported conclusion. When it appears that the court lacks jurisdiction over a particular plaintiff; that is, at a damages stage trial, the party will immediately be dismissed from the case.

The primary problem with the district court's approach of deferring resolution of the jurisdictional question is that such questions must be resolved at the beginning of a case, not the end. *See Employers Ins. of Wausau v. Crown Cork & Seal Co. Inc.*, 905 F.2d 42, 45 (3d Cir. 1990) ("a federal court is bound to consider its own jurisdiction preliminary to consideration of the merits.") (quoting *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n of Philadelphia*, 657 F.2d 29, 36 (3d Cir. 1981)); *See also Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n*, 554 F.2d 1254, 1257 (3d Cir. 1977) ("federal courts should resolve any questions that they may have as to the existence of diversity before proceeding to a decision on the merits.").

Wausau was a diversity action in which the plaintiff insurance company sought a declaration pursuant to the Declaratory Judgment Act of the nature of its obligations arising from certain environmental liabilities that resulted from Wausau's issuance of general liability insurance. One of the defendants (which was not an insurance company) moved to realign the parties so that all the insurance companies with similar interests would

be federal plaintiffs. The court declined to make findings on the motion for realignment (which would have created jurisdictional difficulties if granted). Instead, the district court stayed the federal action on the grounds that there was a state action already pending which would litigate the same questions. We vacated the district court's order and remanded for a resolution of the motion to realign. On remand, the district court would be required to resolve any jurisdictional questions before disposing of the case by stay or dismissal. We noted that "[t]he district court's grant of the stay amounts to the exercise of its dominion over this matter, clearly presupposing that it had subject matter jurisdiction in the first instance. It was therefore bound to first consider [defendant]'s challenge to the diversity between the parties raised in [defendant]'s motion for realignment before it granted the stay." *Wausau*, 905 F.2d at 45. The same is true with respect to the challenge to the district court's subject matter jurisdiction in this case.[3]

Ignoring this Court's long-standing requirement that courts resolve jurisdictional questions at the beginning of a case, the majority relies on a recent decision by the Court of Appeals for the Sixth Circuit for the proposition that a district court may defer until trial the resolution of any jurisdictional questions. *See Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1195-96 (6th Cir. 1988).[4] In *Sterling*, certain class action plaintiffs

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[3] In requiring that the existence of diversity jurisdiction be resolved at the beginning of the case rather than the end, federal courts espouse well accepted principles of federalism. *See, e.g., Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.")

[4] Although I do not consider it to be a fatal flaw, I note that the majority cites *Sterling* and Rule 12(d) as authority for the proposition that a district court may postpone resolution of the jurisdictional question until a trial on the merits. In this case, the district

failed to allege in their complaints that they had claims in excess of the jurisdictional minimum for diversity cases. In response to defendant's motion under Rule 12(b)(1) to dismiss for want of subject matter jurisdiction, the district court, relying on Rules 12(d) and 12(h)(3), deferred resolution of the jurisdictional question until trial. The Sixth Circuit affirmed. At first blush, *Sterling* appears to support the majority's reading of Rules 12(d) and 12(h)(3). The facts of *Sterling*, however, reveal that *Sterling* does not contravene our long-standing rule that jurisdictional questions should be re-

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court has deferred resolution of the jurisdictional question until *after* a trial on the merits and not merely *until* trial. That difference is substantial because 12(d) is the only authority the majority cites for postponing resolution of the question for so long.

There are situations where factual findings could determine the existence of subject matter jurisdiction in a diversity case. For instance, where there is a dispute about the location of a corporation's principal place of business and resolution of that dispute will determine whether diversity exists, it might make sense to defer resolution of that question until trial. *See, e.g., Village Fair Shopping Co. v. Sam Broadhead Trust*, 588 F.2d 431, 433 (5th Cir. 1979) (as regards diversity jurisdiction, the determination of a corporation's principal place of business is a question of fact). Nevertheless, the existence of a dispute as to a corporation's principal place of business would not excuse compliance with Rule 8(a)(1) which requires plaintiffs to plead in their complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." Where a plaintiff fails to show the grounds for federal jurisdiction in his complaint, the court must dismiss the case, unless the defect can be corrected by amendment. *Smith v. McCullough*, 270 U.S. 456, 459 (1926); *Randazzo v. Eagle-Picher Indus., Inc.*, 117 F.R.D. 557, 558 (E.D. Pa. 1987).

In the case before us, plaintiffs have failed to make sufficient jurisdictional allegation with respect to the amount in controversy of each represented plaintiff. Because plaintiffs have admitted this in their amended complaints, there is no factual question to resolve. The only question is which plaintiffs must be dismissed—not whether any plaintiffs will have to be dismissed. If plaintiffs cannot amend their complaints to make jurisdictionally sufficient allegations, their cases should be dismissed entirely.

solved before proceeding to the merits. *See Wausau*, 905 F.2d at 45; *Carlsberg*, 554 F.2d at 1257. Indeed, *Sterling*'s holding that the jurisdictional question may be deferred until trial is completely consistent with our holdings in *Wausau* and *Carlsberg*.

Rule 12(h)(3) requires that the district court dismiss an action "[*w*]*henever* it appears . . . that the court lacks jurisdiction of the subject matter . . . ." Fed. R. Civ. P. 12(h)(3) (emphasis added). When the defendants made the motion to dismiss for lack of subject matter jurisdiction in *Sterling*, there was no basis in the record for believing that any plaintiff would be unable to prove claims in excess of the jurisdictional minimum. Quite the contrary, it appeared that every plaintiff had a claim well in excess of the jurisdictional minimum. *Sterling*, 855 F.2d at 1195. The district court in *Sterling* decided that it was not required to dismiss plaintiffs who failed to allege claims in excess of the jurisdictional minimum when the court had no reason to doubt that any plaintiff would fail to prove a claim in excess of the amount required.

The plaintiffs whose pleading allegations were challenged in *Sterling* were plaintiffs either by virtue of the fact that they did not opt out of the class or had been permitted to join the representative plaintiff class under Rule 20(a). Counsel for the plaintiffs argued that it was unnecessary for the plaintiffs who joined the suit by failing to opt out to allege claims in excess of the jurisdictional minimum, since the original plaintiffs had already claimed jurisdictionally sufficient damages and the non-opt-out plaintiffs adopted the original plaintiff's *ad damnum* clause when they joined the suit.[5]

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[5] The case does not indicate how plaintiffs' counsel responded to the objection that the plaintiffs who joined the suit under Rule 20(a) failed to allege jurisdictionally sufficient damages.

Sterling is a case about pleading rules.[6] No one in *Sterling* expressed serious doubt that any plaintiff, however he became part of the suit, would fail to demonstrate a claim in excess of the jurisdictional minimum. Indeed, plaintiff's counsel assured the court that each plaintiff had claims in excess of the minimum. *Sterling*, 855 F.2d at 1194-95.

In this case, by contrast, plaintiffs have not only failed to allege that every plaintiff has a claim in excess of the jurisdictional minimum, but plaintiff has admitted in its amended complaint that some plaintiffs do not meet the jurisdictional minimum. Furthermore, defendants have introduced uncontradicted evidence that as much as 60% of the plaintiff class cannot meet the jurisdictional requirement. Plaintiffs cannot invoke Rules 12(d) and 12(h)(3) to have their suit because Rule 12(h)(3) requires that the court dismiss the suit "[*w*]*henever* it appears . . . that the court lacks jurisdiction of the subject matter . . . ." Fed. R. Civ. P. 12(h)(3) (emphasis added). It appears that the district court lacks jurisdiction *now*.[7] Accordingly, following the mandate of Rule

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[6] To the extent that *Sterling* implies that it is ever permissible for a plaintiff's complaint to lack a jurisdictionally sufficient claim on its face, I disagree. It is the long standing rule that jurisdiction must exist on the face of a complaint in accordance with Rule 8(a)(1). *Smith v. McCullough*, 270 U.S. 456 (1926).

[7] The majority opinion has created a paper tiger by concluding that Rule 12(d) cannot be given effect unless we read Rule 12(h)(3) as conferring the power to dismiss for lack of subject matter jurisdiction on the court and Rule 12(d) states when that power may be exercised. The majority insists that any other reading of Rule 12(h)(3) would nullify the plain language of Rule 12(d). I disagree.

Professor Wright has explained when a jurisdictional challenge should be deferred. "If . . . a decision of the jurisdictional issue requires a ruling on the merits of the case, the decision should await a determination of the merits . . . ." 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1350, at 235 (1990) (collecting cases); *Id.* § 1373, at 552-54 ("because of its significance, a defense of lack of subject matter jurisdiction usually

12(h)(3), *Carlsberg*, and even *Sterling*, the district court must require that the jurisdictional infirmities be cured *now*.

The majority's reliance on *Sterling* is also misplaced because 28 U.S.C.A. § 1332 does not contemplate dismissal for lack of jurisdiction where a plaintiff has failed to establish damages for less than the jurisdictional minimum after trial. If a prevailing plaintiff fails to establish damages meeting the minimum amount in controversy for diversity cases after trial, 28 U.S.C.A. § 1332(b) (1966 & Supp. 1990) authorizes the district court to deny plaintiff his costs, or even to impose costs on the prevailing plaintiff. 28 U.S.C.A. § 1332(b).[8] If the majority were correct in its analysis of Rules 12(b)(1), 12(d), and 12(h)(3), and its conclusion that a district court may postpone resolution of jurisdictional questions until after trial, 28 U.S.C.A. § 1332(b) would make no sense. Under the majority's reading of these authorities, if a plaintiff were awarded damages for less than the jurisdictional minimum after trial, the district court would dismiss the case for lack of subject matter jurisdiction. But that view was soundly rejected by the Supreme Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (a case cannot be dismissed for lack of jurisdiction if it contains a jurisdictionally sufficient allegation, but the plaintiff recovers

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will receive a hearing, unless its resolution cannot be achieved without a consideration of the merits of the action.") (collecting cases). I think that Professor Wright's construction of Rules 12(d) and 12(h)(3) gives effect to both rules without the strained logic the majority opinion requires.

[8] 28 U.S.C.A. § 1332(b) read in relevant part:

> (b) Except where express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000 . . . the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff . . . .

less than the jurisdictional minimum). Either the district court has jurisdiction and a plaintiff with an inadequate claim is subject to an assessment of costs or the court lacks jurisdiction and the case must be dismissed. Since section 1332(b) explains what course to take if a prevailing plaintiff proves an inadequate claim after trial, it makes no sense to hold that the plaintiff's claim can be dismissed at that stage for lack of subject matter jurisdiction. Because I believe the district court is proceeding beyond its jurisdictional sphere by going to the merits without either dismissing the case or, at least, the plaintiffs whose claims are insufficient, I would issue the writ of mandamus.

B.

The majority has made much of the rule that a case will not be dismissed for lack of subject matter jurisdiction unless it appears to a "legal certainty" that the plaintiffs' claim is insufficient. In support of that proposition, the majority cites *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. at 289. *Red Cab* involved a case which had been removed from state court to federal court. Jurisdiction was invoked under the diversity statute then in effect which required that the plaintiff have at least $3000 in dispute. In the original state action, the plaintiff demanded $4000 and other appropriate relief. *Id.* at 285. After the case was removed to federal court, the plaintiff filed a second amended complaint which again alleged damages of $4000 resulting from an alleged breach of contract. Plaintiff had attached an appendix to the second amended complaint which listed specific amounts of damages resulting from the alleged breach of contract. The appendix, however, indicated damages of only $1,380.89. At trial the plaintiff prevailed, but the damage award was for only $1,162.98. *Id.* at 285.

On appeal, the Court of Appeals refused to decide the case on the merits because the plaintiff had a jurisdic-

tionally insufficient claim after trial. The Supreme Court reversed on the ground that a complaint need only contain a good faith allegation that there is a jurisdictionally sufficient claim. *Id.* at 288 ("The rule governing dismissal for want of [subject matter] jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith."). In the case before us, plaintiffs have failed to plead jurisdictionally sufficient claims because, as they candidly admitted, they could not make such an allegation in good faith. *Red Cab* contains no authority for the proposition that the "legal certainty" test will save a pleading which is inadequate on its face. Rather, the rule of *Red Cab* is that a case will not be dismissed for lack of subject matter jurisdiction where a plaintiff at trial has proven damages which are less than the jurisdictional minimum, notwithstanding the fact that if the plaintiff had alleged only that insufficient amount in the original complaint, the court would have been compelled to dismiss for lack of subject matter jurisdiction. This rule is entirely consistent with the language of 28 U.S.C.A. § 1332(b), which imposes costs on a prevailing plaintiff who after trial has failed to recover a claim that would be jurisdictionally sufficient.

This Court's "legal certainty" test in *Nelson* is not to the contrary. *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971). In *Nelson*, three plaintiffs sued in federal court to recover for personal injuries they sustained in an automobile accident allegedly caused by defendant's negligence. Jurisdiction was invoked on the basis of diversity of citizenship. Although the plaintiffs' complaint apparently had jurisdictionally sufficient claims in its *ad damnum* clause, we looked to the facts averred in support of the complaint and concluded that the trial court had not erred in dismissing the case for lack of subject matter jurisdic-

tion. We agreed that the plaintiffs had failed to allege facts that could conceivably support even a single claim for $10,000. As a result, we concluded that defendants had shown to a "legal certainty" that plaintiffs' claims were insufficient. We therefore affirmed the dismissal for lack of subject matter jurisdiction.

Our holding in *Nelson* is entirely consistent with the rule that, *at a minimum*, plaintiffs must have allegations that are jurisdictionally sufficient. Indeed, in *Nelson*, we held that a jurisdictionally sufficient allegation was not enough—the plaintiff must also allege facts that at some level support a claim that is jurisdictionally sufficient. That is why we affirmed the dismissal in *Nelson*. It bears repeating: plaintiffs concede in their amended complaint that they lack jurisdictionally sufficient claims. We have no choice but to dismiss the actions or, at least, to require that plaintiffs file complaints which comply with 28 U.S.C.A. § 1332. The majority's conclusion today that dismissal is not required has no basis in any decision of any federal court at any time.

Moreover, even if I were willing to yield to the majority's distortion of the "legal certainty" test, I would conclude that petitioners have met their burden of proving to a legal certainty that plaintiffs claims are jurisdictionally insufficient. First, plaintiffs admit exactly that in the amended complaint. Second, petitioners have introduced unrefuted evidence that as much as 60% of the plaintiff class has a claim for less than the jurisdictional minimum. At oral argument, plaintiffs repeatedly stressed that there were at least 16,000 members of the class who had claims in excess of the jurisdictional minimum. This class contains over 35,000 plaintiffs. It remains the law that, "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'" *Zahn*, 414 U.S. at 301 (quoting *Zahn v. Inter-*

national Paper Co., 469 F.2d 1033, 1035 (2d Cir. 1972)). *See also Snyder*, 394 U.S. 332 (separate claims in a class action suit could not be aggregated for the purpose of meeting the jurisdictional minimum amount in controversy requirement). That leaves over 17,000 claims of plaintiffs for which the court lacks jurisdiction. The majority's conclusion that the defendants have failed to show that the plaintiffs' claims are jurisdictionally insufficient to a "legal certainty" is incredible in light of (1) plaintiffs' admission in their amended complaint and (2) defendants' uncontradicted evidence that 60% of the plaintiff class have damages less than the jurisdictional minimum.

The majority claims that "[p]ostponing dismissal of such plaintiffs not only appears prudent, but it meshes with our policy [of dismissing only those 'flagrant' cases where it can be determined in advance 'with legal certainty' that the jurisdictional minimum is not satisfied]." Maj. typescript op. at 16 (citation omitted). But, there is no reason in this litigation to relax the rule in *Zahn*, even if we had that power. Indeed, policy considerations, even if they were relevant in jurisdictional matters, suggest that the rule in *Zahn* should be vigorously applied.

In the event that defendants prevail after a trial on the merits, individual plaintiffs could avoid the preclusive effect of an adverse decision with respect to the common questions of law and fact by proving that they never had a claim in excess of $10,000. It is even possible that plaintiffs whose claims do exceed $10,000 could attack an adverse decision collaterally by later alleging that the class was defective because so many members lacked claims for more than $10,000 that the class action should have been dismissed. For all these reasons, I believe that we have a constitutional duty to grant the mandamus relief petitioners have requested.

II.

The district court refused to dismiss the present case although it was discovered that the plaintiff class included plaintiffs who were not diverse from all defendants. The district court ruled that "if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse parties are named parties, federal jurisdiction is proper. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969); *see also In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987)." Memorandum and Order at 5-6, filed with Pretrial Order No. 197 in *In re School Asbestos Litig.*, No. 83-0268 (E.D. Pa., filed Nov. 15, 1989). Recently, Justice O'Connor expressed the same view in her dissent in *Carden v. Arkoma Assocs.*, 110 S.Ct. 1015, 1023 (1990) (O'Connor, J., dissenting).

The authority cited by the district court supports its conclusion that complete diversity is not jurisdictionally required. Notwithstanding Justice O'Connor's dissent in *Carden* (which was not a suit involving class actions), recent decisions of the Supreme Court undermine that conclusion.[9]

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[9] I dismiss as incorrect the majority's contention that it need not reach defendant's claim of pendent-party jurisdiction because its decision is that diversity jurisdiction exists under section 1332(a) for these class action suits. *See* maj. typescript op. at 12. It is beyond dispute that there is no subject matter jurisdiction in diversity cases where there is incomplete diversity between plaintiffs and defendants. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Since I doubt that the majority would attempt to overrule the Supreme Court on this or any other point, I must construe the majority's statement that the exercise of jurisdiction over nondiverse class action plaintiffs is permissible under section 1332(a) as a statement that the non-diverse class action plaintiffs fall within the court's pendent-party jurisdiction. *See, e.g., Finley v. U.S.*, 109 S. Ct. at 2006 (pendent-party jurisdiction is "jurisdiction over parties not named in any claim that is independently cognizable by the federal court"). In other words, the exercise of jurisdiction over parties where the court otherwise lacks subject matter jurisdic-

In order for an inferior court to have jurisdiction over any matter, it must have both constitutional and statutory authority. *See Finley v. U.S.*, 109 S.Ct. 2003, 2006 (1989) ("It remains rudimentary law that '[a]s regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* . . . . To the extent that such action is not taken, the power lies dormant.'" (quoting *The Mayor v. Cooper*, 6 Wall. 247, 252 (1868)).

To determine whether jurisdiction exists in any case, the court must first ascertain whether it has a constitutional grant of power over the subject matter. The Constitution extends the judicial power to "all Cases . . . arising under this Constitution, the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States . . ." U.S. Const. art. III, § 2. The case before us now concerns the power of a federal court to exercise jurisdiction in a diversity suit over parties over whom there is no independent basis for jurisdiction (because of a lack of complete diversity).

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tion *is* pendent-party jurisdiction—to say that a federal court can exercise jurisdiction over non-diverse parties in a Rule 23(b)(3) class action is to say that the federal court has pendent-party jurisdiction over the non-diverse plaintiffs.

As it stands, the majority seems to suggest that there is a special kind of jurisdiction known as class action jurisdiction which amounts to an exception to the rule requiring complete diversity where jurisdiction is based on diversity of citizenship. This suggestion implies that Rule 23 somehow enlarges the jurisdiction of federal courts in diversity cases. "[I]t is axiomatic, [however,] that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). *See also* Fed. R. Civ. P. 82. Again, I can only presume that the majority opinion rests on the conclusion that 28 U.S.C. § 1332(a) contains a statutory grant of power for federal courts to exercise pendent-party jurisdiction.

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) is the seminal case on the scope of the constitutional grant of jurisdictional power. *Gibbs* concerned the power of a federal court to retain jurisdiction of a state law claim after it dismissed the federal claim on which federal jurisdiction had been based. As such, *Gibbs* is properly classified as a case about pendent-claim jurisdiction (the power of a federal court to hear claims for which there is no independent basis for federal jurisdiction), while the case we have before us is pendent-party jurisdiction (the power of a federal court to hear actions concerning parties for whom there is no independent basis for jurisdiction).

Gibbs set forth a broad reading of the constitutional grant of jurisdictional power.

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *,' U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action bfore the court comprises but one constitutional 'case.'

Gibbs, 383 U.S. at 725 (footnote omitted). The relationship between the state and federal claim permit the conclusion that they comprise one constitutional case when they "derive from a common nucleus of operative fact." *Id.* The test for whether the two claims derive from a 'common nucleus of operative fact,' is "if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.* (footnote omitted).

Although it is by no means an easy question, I am willing to assume that all claims at stake in this class action derive from a common nucleus of operative fact such that there is before us one constitutional case. Accordingly, I agree that we have constitutional power to hear this case. Constitutional power, however, is not enough.

The next step is to determine how much of this constitutional grant of power has been congressionally authorized in 28 U.S.C.A. § 1332(a). *See Finley*, 109 S.Ct. at 2007 ("Our cases show . . . that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.") From as early as the Judiciary Act of 1789, in which Congress first authorized federal courts to exercise diversity jurisdiction, the Supreme Court has interpreted the legislative grant of jurisdictional power to hear diversity suits to require "complete diversity" of citizenship. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *See also Carden*, 110 S.Ct. at 1017 (1990).

Following the doctrine requiring complete diversity, the Supreme Court has refused to read 28 U.S.C.A. § 1332(a) as granting federal courts power to exercise pendent-party jurisdiction in diversity cases. In *Zahn v. International Paper*, *supra*, the Court refused to allow class action plaintiffs to aggregate their claims to satisfy the jurisdictional minimum amount in controversy, notwithstanding the fact that all the claims together amounted to a single constitutional case under *Gibbs*. *See Finley*, 109 S.Ct. at 2007. Professor Moore has written, based on the reasoning of *Zahn*, "the citizenship of each member of the class must be considered." 1990 *Moore's Federal Practice Rules Pamphlet*, ¶ 23.18 at 253. In *Kroger*, 437 U.S. 365, another diversity case, the Court refused to permit the plaintiff to assert a claim

directly against a non-diverse third party, although the Court recognized that the controversy involved one constitutional case under the *Gibbs* test. Thus, the Supreme Court has not read 28 U.S.C.A. § 1332(a) to confer the power on federal courts to exercise jurisdiction over parties for whom there is no independent basis for jurisdiction in diversity cases.

The only time that the Supreme Court has ever exercised anything that even looks like pendent-party jurisdiction in a class action diversity suit was in 1921. In *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), the Court held that unnamed plaintiff members of a class action suit who had lost their suit in federal court were precluded from suing again in state court based on the same underlying claim. The class action plaintiffs argued that they were not bound by the decision in the first case because joinder of them in the first case would have destroyed complete diversity in the federal class action. The Court held that the plaintiffs were barred from suing again because they were properly represented in the first suit. *Id.* at 367.

Ben-Hur has been characterized by the Supreme Court as an example of "ancillary jurisdiction," which the Court then described as a doctrine "bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." *Aldinger v. Howard*, 427 U.S. 1, 11 (1976). Under the modern class action rules, *Ben-Hur* would be a Rule 23(b)(1) class action, since the dispute involved indivisible claims of class members to a common fund. Accordingly, the reasons for the decision in *Ben-Hur* are not controlling here.

The Supreme Court on two occasions has dealt with the question whether a federal court could exercise

pendent-party jurisdiction over parties for whom there was no independent basis for jurisdiction in class action diversity suits. The first was in *Snyder*, 394 U.S. 332. In *Snyder*, the Court stated in *dicta*, "Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State." *Id.* at 340 (citing *Ben-Hur*, 255 U.S. 356). *Snyder* is not, however, controlling on this issue, since the controversy in that case concerned the power of a federal court to exercise pendent-party jurisdiction over class action plaintiffs whose claims were for less than the jurisdictional minimum amount in controversy. In *Snyder*, the Court held that there was no subject matter jurisdiction and dismissed the case. There was no question presented there about the power of the Court to exercise jurisdiction over the claims of non-diverse class action plaintiffs. As a result, although we must respect reasoned *dicta* of the Supreme Court, *see, e.g.*, *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120, n.8 (7th Cir. 1989), we are not bound to follow the *Snyder* Court's conclusion since that was not the issue addressed. *See also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases").

The second instance where the Supreme Court mentioned the question whether a federal court could exercise pendent-party jurisdiction over parties for whom there was no independent basis for jurisdiction was in Justice O'Connor's dissent in *Carden*, 110 S.Ct. at 1023. Unlike *Snyder*, *Carden* was not even a case about class actions. The dispute in *Carden* was whether, in a suit brought by a limited partnership, the citizenship of the limited part-

ners must be considered in determining diversity of citizenship among the parties. *Carden*, 110 S.Ct. at 1016. The majority answered in the affirmative, the dissent disagreed. There was no discussion in *Carden* about pendent-party jurisdiction—everyone agreed that there had to be complete diversity between all plaintiffs and all defendants. The inquiry was whether citizenship of the limited partners mattered for the purpose of determining the citizenship of the artificial entity known as the limited partnership. There was no question before the Supreme Court about the need for an independent basis of jurisdiction for every plaintiff in court. The only question was whether partnerships should be treated like corporations for the purpose of determining citizenship. Accordingly, even if the dissent had been the majority opinion in *Carden*, we would not be bound by the statement that only the citizenship of the named plaintiffs matter in Rule 23 class actions. We are, of course, not bound by a dissent to a Supreme Court opinion.

Recently, another Court of Appeals addressed a similar issue to the one before this Court. In *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 161-62 (2d Cir. 1987), the court held that under long-standing Supreme Court doctrine, "complete diversity is required only between the named plaintiffs and the named defendants in a federal class action." *Id.* at 162. While I recognize that *In re Agent Orange* directly supports plaintiffs' jurisdictional theory, I believe that its vitality has been totally undermined by the Supreme Court's decision in *Finley*.

Finley reminds us that federal courts must have both a constitutional and statutory basis for exercising jurisdiction. While we might assume under *Gibbs* that the district court had the constitutional power to hear the case, the same is by no means true of the statutory power authorized by 28 U.S.C.A. § 1332(a). The question boils down to whether section 1332(a) can be read as containing an authorization by Congress for federal courts to

exercise jurisdiction over parties over whom there is no independent basis of jurisdiction, *i.e.*, where complete diversity is lacking. I do not believe it can.

In case after case, the Supreme Court has refused to allow federal courts to exercise pendent-party jurisdiction over parties for whom there was no independent basis for federal jurisdiction in diversity cases. *See, e.g.*, *Kroger*; *Zahn*; *Snyder*; and *Strawbridge v. Curtiss*. In light of Supreme Court precedent that has consistently refused to read 28 U.S.C.A. § 1332(a) as containing an authorization for federal courts to exercise pendent-party jurisdiction over parties where complete diversity is lacking, I conclude that the district court must dismiss these cases for lack of subject matter jurisdiction.

III.

These three class actions should have been dismissed by the district court for lack of subject matter jurisdiction. Defendants have introduced unrefuted evidence that as much as 60% of plaintiff class cannot meet the jurisdictional minimum amount in controversy required by 28 U.S.C.A. § 1332(a). Plaintiffs have even conceded this in the complaint. Inasmuch as the Supreme Court has long held that every plaintiff with a distinct claim must meet the jurisdictional minimum requirement even in class action suits, the case should be dismissed. Nor am I persuaded by the majority's articulation of a "legal certainty" test that defendants have failed to meet. Even the most stringent (and distorted) version of this test which would waive the requirement that the plaintiff plead facts which support an allegation that the federal court has jurisdiction over the subject matter shows to a "legal certainty" that the majority of plaintiffs represented in this class action have claims for less than the jurisdictional minimum.

In addition to the fact that the district court lacks subject matter jurisdiction because of jurisdictionally in-

sufficient claims, this class action also violates the requirement that there be "complete diversity" between all plaintiffs and all defendants. Because complete diversity is lacking between members of the plaintiff class and named defendants, the case should have been dismissed for lack of subject matter jurisdiction.

I would grant the writ of mandamus defendants have requested.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Filed December 13, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1247 & 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
and NORTHEASTERN SCHOOL DISTRICT,
Appellees,

vs.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES INC., DANA CORPORATION, U.S. GYPSUM, U.S. MINERAL PRODUCTS COMPANY, SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION COMPANY, W.R. GRACE & CO., OWENS-CORNING FIBERGLAS CORPORATION, STANDARD INSULATION, INC., NORTH AMERICAN ASBESTOS CORPORATION, CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LIMITED, THE FLINTKOTE CO., FIBREBOARD CORPORATION, GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORPORATION, BES-TEX, INC., GEORGIA-PACIFIC CORP.,

Kaiser Cement Corporation,
Appellant No. 90-1247

United States Gypsum Company,
Appellant No. 90-1248

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 0313-2:83-00268)

Argued: Wednesday, September 19, 1990

Before: SCIRICA, COWEN, and ALDISERT,
Circuit Judges

[Filed December 13, 1990]

THOMAS KIRBY, ESQ. (Argued)
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

Counsel for Appellants

JOHN H. LEWIS, JR., ESQ.
JOSEPH B. G. FAY, ESQ.
J. GORDON COONEY, JR., ESQ.
ANDREW D. LEIPOLD, ESQ.
RICHARD H. MCADAMS, ESQ.
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

Counsel for Appellant,
United States Gypsum Co.

DANIEL J. RYAN, JR., ESQ.
MARSHALL, DENNEHEY,
WARNER, COLEMAN
& COGGIN
1515 Locust Street
Philadelphia, PA 19102

PATRICK J. HAGAN, ESQ.
KINCAID, GIANUNZIO, CAUDLE & HUBERT
200 Webster Street
Suite 200
Oakland, CA 94604-0828

Counsel for Appellant,
Kaiser Cement Corp.

HERBERT B. NEWBERG, ESQ.
HARVEY S. KRONFELD, ESQ.
GERALD E. WALLERSTEIN, ESQ.
SANDRA L. DUGGAN, ESQ.
HERBERT B. NEWBERG, ESQ., P.C.
227 South Sixth Street
Lippincott Building 2nd Floor
Suite 200
Philadelphia, PA 19106

DAVID BERGER, ESQ. (Argued)
HAROLD BERGER, ESQ.
WARREN MULLOY, ESQ.
HOWARD LANGER, ESQ.
THOMAS F. HUGHES, ESQ.
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103

Counsel for Appellees,
School District of Lancaster
Manheim Township School District
Board of Education of the Memphis City Schools
Barnwell School District

MOLLY S. BOAST, ESQ. (Argued)
JAY G. SAFER, ESQ.
FREDERICK B. LACEY, ESQ.
LEBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, NY 10022

EDWARD W. MADEIRA, JR., ESQ.
RICHARD W. FOLTZ, JR., ESQ.
MATTHEW H. ADLER, ESQ.
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
Philadelphia, PA 19103-2799

Counsel for Appellee,
Lake Asbestos Quebec

CHARLES ALAN WRIGHT, ESQ.
727 East 26th Street
Austin, TX 78705

Of Counsel to Appellees

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

Here we are confronted with an appeal by two non-settling defendants in a nationwide class action asbestos action who unsuccessfully contested a settlement agreement entered into by another defendant in the district court. We conclude that these non-settling defendants lack standing to challenge the agreement. Accordingly, we affirm the judgment of the district court.

I.

In 1984, the district court certified a nationwide opt-out class of school districts seeking to recover from approximately fifty defendants. Three defendants made offers to settle: Owens-Illinois, Inc., Proko Industries, and Lake Asbestos of Quebec, Ltd. ("LAQ"). The district court approved the OI/Proko settlement, over objections by certain defendants. The court ruled that such non-settling defendants lacked standing to object to a settlement with a co-defendant.

On November 27, 1989, the district court preliminarily approved a one million dollar settlement with LAQ; it also approved a corresponding form of notice submitted by the class plaintiffs, directing notice to be sent by first class mail. The district court concluded that the settlement with LAQ was fair, reasonable, adequate, and proper, and entered final judgment on the settlement as to the class defined in the settlement agreement. Two non-settling defendants, Kaiser Cement and United States Gypsum, appeal the LAQ settlement agreement.

In the underlying litigation a question was raised as to jurisdiction. We determined in *In re School Asbestos Litig.*, —— F.2d —— (3d Cir. 1990) (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (filed on this date) that the defendant petitioners had not met their burden of showing a "clear and indisputable lack of subject matter jurisdiction in the district court." Thus, jurisdiction in the trial court was proper based on 28 U.S.C. § 1332. Jurisdiction on appeal is proper based on 28 U.S.C. § 1291. Appeal was timely filed under F.R.A.P. 4(a).

Review of the essentially legal question of standing is plenary. *PIRG of New Jersey v. E.P.A.*, 913 F.2d 64 (3d Cir. 1990).

II.

The district court held that Kaiser and United States Gypsum lacked standing to contest the LAQ agreement:

> As a general rule, a non-settling defendant is not prejudiced by the settlement and therefore has no standing to contest the settlement. *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979). There are, however, two recognized exceptions to this general rule. A non-settling defendant can object to a settlement: 1) when the terms of the settlement preclude the non-settling defendant from seeking indemnification from the settling defendant, and 2) when the settlement affects the rights of the

non-settling defendant. *In Re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979); *In Re Fine Paper Litigation*, 632 F.2d 1081 (3d Cir. 1980).

Pretrial Order No. 66; Appellees' Brief at 7. The court recognized the general exception to the rule denying standing when "non-settling defendants are precluded from seeking indemnification from settling defendants" and rejected appellant Kaiser Cement's claim that its right to indemnification or contribution was compromised. Memorandum and Order of February 16, 1990 at 6; App. at 809.

III.

Kaiser and U.S. Gypsum argue on appeal that their rights are not adequately protected by the settlement agreement and that they have standing to raise issues arising from the LAQ settlement. Basically, their argument is that the settlement agreement bars them from pursuing claims for contribution or indemnity against LAQ. *See* Brief for Kaiser Cement Corp. at 37-43; Brief for U.S. Gypsum at 14-20. They contend that their dismissal by the district court leaves them out in the cold, unable to test subject matter jurisdiction and the adequacy of the procedures leading to final judgment. They argue that they should be given the opportunity to assert these claims in order to preserve their rights to contribution or to establish judgment reduction rights against class members in this or subsequent litigation.

The appellees counter that these protestations are without merit. They argue that appellants have failed to demonstrate legal prejudice that might give them standing to contest the LAQ settlement and, lacking this, their "lost opportunity" argument cannot be asserted and their appeal should be dismissed.

It is clear that the appellants bear the burden of demonstrating that they have standing. *See e.g., Ass'n of*

Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 154 (1970); *Baker v. Carr*, 369 U.S. 186, 204 (1961). To establish standing to appeal a settlement, a non-settling defendant may not merely claim an interest in the lawsuit but must show some cognizable prejudice to a legal relationship between it and the settling parties. *In re Fine Paper Litig. State of Wash.*, 632 F.2d 1081, 1087 (3d Cir. 1980) (non-settling party may not object to settlement terms that do not affect its own rights); *Utility Contractor's Ass'n of New Jersey v. Toops*, 507 F.2d 83, 85 (3d Cir. 1975) (non-settling parties have no standing to object to partial settlement where they demonstrated no interference with any legal relationship between them and the settling parties); *see also Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230 (7th Cir. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 614 F.2d 111 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981). The appellants assert that standing is established because their rights to contribution or indemnity are compromised by the LAQ settlement. We disagree.

IV.

The agreement with LAQ specifically provides that, in the event any defendant obtains a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against such defendant will be reduced by any "amount percentage or share of such judgment attributable to LAQ.":

> The Class shall reduce any judgment it obtains against any defendant by the amount, percentage or share of such judgment attributable to LAQ so as to bar, discharge and release under applicable law any claims for contribution or indemnity against LAQ arising from or related to the Claims. In the event

> that the Class obtains a judgment (including pursuant to a settlement agreement) against one or more of those defendants, obtains a judgment over, in whole or in part, against one or more of those defendants in the Litigation, and any of those defendants obtains a judgment over, in whole or in part, against LAQ for contribution or indemnity, then the Class will be required to reduce or remit any judgment or portion thereof obtained from those defendants by the amount of the judgment over against LAQ.

Paragraph 12 of Settlement Agreement; App. at 178. In his text on class actions, Herbert B. Newberg, counsel for plaintiff-appellees here, examined this scenario and concluded:

> When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law or, in the absence of statute, by a reduction in the judgment against non-settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, non-settling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement. See § 12.42A.

2 *Newberg on Class Actions* § 11.54 n.472 (2d ed. 1990 Pocket Part at 103). We accept these reasons and find them consistent with our policy of encouraging settlement of complex litigation that otherwise could linger for years. *See also Waller v. Financial Corp. of Am.*, 828 F.2d 579 (9th Cir. 1987); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979).

The settlement agreement in this case specifically recognizes the existence of indemnification and contribution rights of non-settling defendants and the Order approving the settlement contains no ruling purporting to limit any claims non-settling defendants may have. Accordingly, appellants lack standing. We, therefore, do not reach the issue of whether adequate procedures were followed in the settlement approval process. *See In re Beef Industry Antitrust Litig.*, 607 F.2d at 172.

V.

The judgment of the district court will be affirmed.

Cowen, *Circuit Judge*, dissenting.

This appeal arises from a final judgment entered pursuant to a partial settlement agreement between one class action defendant and the plaintiff class under Fed. R. Civ. P. 23(c)(3) and Fed. R. Civ. P. 54(b) in three consolidated class actions filed in the United States District Court for the Eastern District of Pennsylvania. The final order dismisses with prejudice the claims of all class members against defendant Lac D'Amiante Du Quebec, Ltee ("LAQ"). It also purports to bind members of the plaintiff class to "adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ." App. at 804.

Kaiser Cement Corporation and United States Gypsum Company (the "non-settling defendants") object to the settlement arguing that it prejudices the rights of non-settling defendants. The district court disagreed and held that their rights are not prejudiced and that the non-settling defendants lack standing to challenge the adequacy and fairness of the settlement. The majority opinion affirms. Because I believe that the district court lacks jurisdiction over these consolidated Rule 23(b)(3) class action cases and that the settlement prejudices the rights of non-settling defendants, I respectfully dissent.

I.

For the reasons set forth in my dissent in *In re School Asbestos Litig.*, —— F.2d —— (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (3d Cir. 1990) (Cowen, J., dissenting) (filed on this date), I believe that the district court lacks subject matter jurisdiction in the underlying litigation. Accordingly, I would remand to the district court to vacate the judgment of the district court and dismiss the case.

Even if the district court did have jurisdiction, it would nevertheless be inappropriate to enter final judgment with respect to LAQ because the district court has not yet determined the identity of the plaintiff class.

A.

Rule 23(c)(3) requires that a final judgment in a Rule 23(b)(3) class action "include and specify or describe" those whom the court finds to be members of the class.[1] The district court has not yet determined which plaintiffs are actually part of this nation-wide class action suit, because all parties acknowledge that some members of the plaintiff class have claims for less than the minimum amount in controversy required by former 28 U.S.C.A. § 1332(a).

Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) requires that "[e]ach plaintiff in a Rule 23(b)(3) class action . . . satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case . . . ." In order to avoid dismissing the entire

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[1] Rule 23(c)(3) reads in relevant part:

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

class action now, as *Zahn* requires, the district court has vowed in Pre-Trial Order No. 197 to "cure" the jurisdictional deficiencies after trial by entering final judgment only on behalf of plaintiffs who have proven claims meeting the jurisdictional minimum. App. at 542-543.

As I discuss in my dissent in *In re School Asbestos Litig.*, —— F.2d —— (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (Cowen, J., dissenting) (filed on this date), this approach is flawed. Nevertheless, the majority in that case allows the district court to proceed to the merits without first curing the acknowledged jurisdictional defects. *Id.*, maj. typescript op. at 12-17. Therefore, the subject matter jurisdiction of the district court, if it exists at all, is predicated on Pre-Trial Order No. 197, indicating that the district court will not enter final judgment with respect to any plaintiff who fails to establish a jurisdictionally sufficient claim. App. at 542-543. In other words, the identity of the plaintiff class will not be determined until a damages-stage trial. That is precisely why the district court may not enter a final judgment against LAQ now: the entry of final judgment with respect to a class action defendant before determining the identity of the plaintiff class violates the plain language of Rule 23(c)(3) which requires that the judgment "include and specify or describe" those whom the court finds to be members of the class.

B.

Even if Rule 23(c)(3) did not require that the court identify the members of the plaintiff class before the entry of final judgment, precedent mandates that the district court resolve questions as to its jurisdiction before the entry of final judgment. *See Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 905 F.2d 42, 45 (3d Cir. 1990) ("[A] federal court is bound to consider its own jurisdiction preliminary to consideration of the

merits.") (citations omitted); *Pacific Intermountain Express Co. v. Hawaii Plastics Corp.*, 528 F.2d 911, 912 (3d Cir. 1976) (per curiam) ("a district court is not permitted to dispose of a case against a party on non-jurisdictional grounds until it first determines it has jurisdiction over such party.")

Both *Wausau* and *Hawaii Plastics* involved declaratory judgment actions where the district courts disposed of the cases as an exercise of discretion under the Declaratory Judgment Act before they resolved the pending challenges to the district courts' jurisdiction. In both cases we reversed.

In *Wausau*, we explained that disposition of a case "amounts to the exercise . . . of dominion over [the] matter, clearly presupposing . . . subject matter jurisdiction in the first instance. *Wausau*, 905 F.2d at 45. Likewise, in *Hawaii Plastics* (where both the court's personal and subject matter jurisdiction were challenged), we held that a court may not dismiss a case on non-jurisdictional grounds until it determines that it has jurisdiction. *Hawaii Plastics*, 528 F.2d at 912.

In the case at bar, the district court considered whether it had subject matter jurisdiction and concluded that it did—provisionally. That is, the district court determined that it could exercise jurisdiction over the consolidated case, *as long as* it entered no final judgment in favor of a plaintiff with a jurisdictionally insufficient claim. Entry of final judgment before identifying which plaintiffs must be dismissed undermines the only basis on which the district court can conceivably maintain jurisdiction over this case. To avoid disposing of this case on non-jurisdictional grounds before the district court "cures" the acknowledged jurisdictional defects, I would require that the district court postpone the entry of final judgment against LAQ until it first determines that it has jurisdiction over every plaintiff who will share in

the judgment, as required by *Zahn*, 414 U.S. 291 and Rule 23(c)(3).

II.

The majority opinion declines to reach the question whether the entry of final judgment in this case is proper on the grounds that the non-settling defendants lack standing to challenge the settlement agreement. I disagree with this conclusion. I do, however, agree with the majority's statement of the law in Section III with respect to standing: a non-settling defendant "must show some cognizable prejudice to a legal relationship between it and the settling parties." Maj. typescript op. at 8. I also agree that this test is met (1) when the terms of the settlement preclude the non-settling defendant from seeking contribution or indemnification from the settling defendant, and (2) when the settlement otherwise affects the rights of the non-settling defendant. Maj. typescript op. at 6. I part company with the majority only in its conclusion that the non-settling defendants have failed to meet the "legal prejudice" test in this case.

A.

The parties agree and the majority apparently recognizes that the non-settling defendants *will* be prejudiced by the LAQ settlement. The non-settling defendants will be prejudiced because in many jurisdictions, a defendant's good faith settlement (such as the settlement of LAQ in this case) extinguishes contribution and indemnity rights of joint tortfeasors. *See Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796, 803-804 (W. Va. 1990) (collecting cases); *Lowe v. Norfolk & Western Ry. Co.*, 753 S.W.2d 891, 894-95 (Mo. 1988) (en banc). The effect will be that the non-settling defendants will not be entitled under the law of many jurisdictions to obtain a reduced judgment against themselves for the share or percentage of

the judgment attributable to the conduct of LAQ.[2] Indeed, LAQ has conceded that "the settlement may have the effect, under applicable law, of barring non-settling defendants from seeking contribution or indemnity from LAQ for certain Class members' claims." App. at 656.

The settlement agreement with LAQ seeks to vitiate this prejudice by including a provision stating that any judgment for contribution that a non-settling defendant obtains against LAQ will be satisfied by a reduction from that non-settling defendant's liability to the prevailing plaintiff class.[3] In essence, the plaintiff class

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[2] I realize that in some states this prejudice will be mitigated by a statutory right by the non-settling defendant to receive a set-off in the judgment against it. *See* 2 *Newberg on Class Actions* § 12.42A supp. at 124-25 (2d ed. Supp. 1990) ("Twenty-two states have adopted some form of 'settlement bar statute.' These statutes permit settling defendants to escape cross- and third-party claims for contribution by granting non-settling joint tortfeasor codefendants some form of offset rights in any future judgment by the settling plaintiff against them."). Even in these states, the non-settling defendants may be prejudiced depending on which method of set-off the state uses: *pro tanto* (a reduction in the verdict by the amount that the settling defendant already paid—which could be less than that defendant's proportionate liability, which in turn would leave the non-settling defendants liable for more than their fair share); or *pro rata* (a reduction in the verdict by that proportion of the judgment that was attributable to the settling defendant). In states that have *pro tanto* settlement bar statutes, the non-settling defendants are prejudiced by the lost opportunity either to get contribution from the settling defendant or to get a *pro rata* set-off from the judgment against them.

[3] The settlement agreement provides,

> The Class shall reduce any judgment it obtains against any defendant by the amount, percentage or share of such judgment attributable to LAQ so as to bar, discharge and release under applicable law any claims for contribution or indemnity against LAQ arising from or related to the Claims. In the event that the Class obtains a judgment (including pursuant to a settlement agreement) against one or more defendants in the Litigation and any of those defendants obtains a judgment over, in whole or in part, against LAQ for contribution or indemnity,

has agreed as part of the settlement with LAQ that it will reduce from any judgment it obtains against a non-settling defendant any liability LAQ has to the non-settling defendant as a result of LAQ being a joint tort-feasor.

The determinative question is whether LAQ and the plaintiffs can defeat the non-settling defendants' standing to challenge a settlement agreement which prejudices their rights merely by including a provision in the settlement agreement that plaintiffs will reduce their judgment against the non-settling defendants by the amount of the contribution judgment against LAQ. I believe that the inclusion of such a provision cannot defeat the non-settling defendants' standing for two reasons: first, there is no precedent for it; and second, there is no guarantee that this right to a set-off will be enforceable against the plaintiff class in the event the settlement agreement were later found to be unfair, inadequate, or entered into pursuant to an inadequate procedure. In short, a non-settling defendant could find itself cut off under state law from its rights of indemnity or contribution against LAQ by the existence of a good faith settlement agreement between LAQ and the plaintiff class, and yet unable to enforce the right to a reduced judgment that it purportedly received in exchange.

B.

The majority has cited only one authority for the proposition that a provision in a settlement agreement can defeat a non-settling defendants' standing. That sole authority is the 1990 pocket part of Herbert B. Newberg's treatise on class actions. 2 *Newberg on Class*

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then the Class will be required to reduce or remit any judgment or portion thereof obtained from those defendants by the amount of the judgment over against LAQ.

Paragraph 12 of Settlement Agreement, App. at 178.

Actions § 11.54 n.261 (2d ed. 1990 Supp.).[4] The pocket part cites no court or other authority for its statement.

Mr. Newberg is a paid advocate, not a disinterested scholar. He entered an appearance as co-lead counsel in this case on May 10, 1984. He signed the briefs on this appeal and argued one of the related cases at oral argument. Under the circumstances, the assertion in his treatise, which he added while this case was pending, must be treated like the partisan opinion of a paid advocate. I am at a loss to understand why the majority has found it persuasive and has relied on it as the sole authority for the proposition that a plaintiff can defeat a non-settling defendant's standing by such a provision in the settlement agreement. In the 1985 edition of his treatise, Mr. Newberg recognized no limitation to the general rule that "non-settling defendants . . . may object to any terms [in a settlement] that preclude them from seeking indemnification from the settling defendants." 2 *Newberg on Class Actions* § 11.54 (2d ed. 1985) (footnotes omitted).

C.

The non-settling defendants raise several grounds for asserting that the settlement agreement might not bind the plaintiff class. Essentially, the non-settling defend-

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[4] Mr. Newberg writes:

> When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law or, in the absence of statute, by a reduction in the judgment against non-settling defendants by the amount of any contribution judgment against settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, nonsettling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement. See § 12.42A.

2 *Newberg on Class Actions* § 11.54 n.261 (2d ed. 1990 Supp.).

ants argue that the settlement notice mailed to the class members was not sufficient to enable a class member to judge the settlement's reasonableness. As a result, the non-settling defendants are concerned that they will not be able to enforce the settlement agreement, but will nevertheless have lost their rights to contribution or indemnity under the laws of some jurisdictions.

The first problem with the notice mailed to class members is that it did not disclose that there was severe doubt regarding the district court's subject matter jurisdiction. There are 35,000 institutions which receive notice regarding the class action. The court does not have jurisdiction over all of them. None of the class members, however, have been informed that their rights are not being litigated in the class action. Quite the contrary, each class member has every reason to believe that not only are its rights being adjudicated, but that it cannot seek to recover damages on its own because the federal class action is the exclusive forum for resolving the asbestos in schools liability issues. In the meantime, some of those class members (perhaps even a majority) will not only fail to share in the settlement, but also lose their ability to pursue relief separately since the applicable statutes of limitation will eventually expire. Accordingly, the class members who received notice of the partial settlement were unable to assess the risks of agreeing to the settlement and were unable to protect themselves by objecting.

The second reason that the settlement notice was insufficient is that it failed to explain the significance of the release that the class gave to LAQ. There is no limitation in the amount that the plaintiff class has agreed to set-off. It is consequently possible that the non-settling defendants will have contribution or indemnity claims against LAQ that exceed the amount LAQ has paid to settle its liability in this case. The plaintiff class members have never been informed of this possibility

and so were unable to assess the risks of not objecting to the settlement with LAQ.

Finally, the settlement notice was inadequate because it was not mailed to all members of the class as required by Rule 23(e) and Procedural Due Process. *See Girsh v. Jepson*, 521 F.2d 153, 158 (3d Cir. 1975). The class is defined as all entities that "own or operate in whole or in part" any public or private elementary and secondary educational facility, as defined in 20 U.S.C.A. § 2854 (a)(10) (1982) (current version at 20 U.S.C.A. § 2891 (12) (1990)). App. at 153. Notice has only been sent to public and private schools, and not to any non-school private party or state agency. App. at 157. In addition, no notice has ever been sent to any school in Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, although all these areas fall within the statutory definition invoked in the class definition. *See* 20 U.S.C.A. § 2854(a)(10), (16) (1982) (current version at 20 U.S.C.A. § 2891(12), (22) (1990). *See also* App. at 153. In other words, plaintiffs have failed to notify some parties that are entitled to receive notice of the class action proceeding, since they are ostensibly members of the plaintiff class.

We have previously held that where "notice was fatally defective, all subsequent proceedings pertaining to the settlement are devoid of validity and all settlement orders issued pursuant to those proceedings will therefore be vacated." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 834 (3d Cir. 1973). In other words, the non-settling defendants could find that they have received an unenforceable right to a diminution of a judgment in favor of the plaintiff class in exchange for their lost rights to indemnity and contribution from the settling defendant.

Even if there is no merit to the claims of the non-settling defendants that the notice was insufficient for

the reasons discussed above, I do not think that it comports with Due Process to allow the plaintiffs and LAQ to shift the risk of the unenforceability of the settlement agreement to the non-settling defendants. It is patently unfair to place the non-settling defendants in the position in which they now find themselves—having to accept a potentially unenforceable right to set-off in exchange for the contribution or indemnity remedies they would otherwise have.

III.

Because I believe that the district court lacks subject matter jurisdiction, I would remand to the district court to vacate the judgment and dismiss the case. Even if the district court did have subject matter jurisdiction, the entry of final judgment in this case is inappropriate: the district court has not yet identified the plaintiffs who comprise the class that was certified in these consolidated actions, in violation of the plain language of Rule 23 (c)(3). Even without Rule 23(c)(3), precedent requires that we resolve jurisdictional questions before we dispose of a case on the merits. Here the district court must dismiss those plaintiffs with jurisdictionally insufficient or inappropriate claims before it can enter final judgment against any defendant. In addition, I believe that the non-settling defendants have standing to challenge the settlement agreement since it prejudices their rights in a number of ways. I would vacate the judgment and remand to dismiss the class action consistent with my dissent in *In re School Asbestos Litig.*, ——F.2d —— (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (Cowen, J., dissenting).

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

[Filed Nov. 15, 1989]

J. M. KELLY, J. November 14, 1989

Procedural Background

On May 1, 1989, following oral argument, this court entered Pretrial Order No. 191 directing the plaintiffs to file amended pleadings curing the allegational deficiencies brought to the attention of the court by defendants Kaiser Gypsum Company, Inc., United States Gypsum Company and a number of undersigned defendants in various motions to dismiss. On May 30, 1989, the plaintiffs filed amended complaints in this cause of action. On June 13, 1989, certain defendants filed a motion to dismiss and to strike the allegations of class representation from the amended complaints for failure to plead subject matter jurisdiction. On June 16, 1989, defendant Fibreboard Corporation filed a motion to dismiss for lack of subject

matter jurisdiction.[1] The parties have completed the process of filing briefs responsive to the jurisdictional issue before the court.

Discussion

I will address, in turn, the central arguments of the defendants. First, defendants argue that any class action under Fed. R. Civ P. 23(b)(3) whose jurisdiction is founded upon 28 U.S.C. § 1332(a) cannot include plaintiffs whose claims do not amount to or exceed the sum of ten thousand dollars ($10,000). In *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973), the Court held that district courts are required to dismiss from the class action any specific class member who does not meet the amount in controversy requirement. *Zahn* does not require that the entire class action be dismissed for lack of subject matter jurisdiction over the unnamed members who do not have a claim for $10,000 or more. The applicable standard requires that it appear to a "legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (footnote omitted). Although this court has no affirmative obligation to police the damages claims, by admission of the plaintiffs, the court has cause to inquire as to the sufficiency of the claims of putative class members. *See In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987). In this case, it is uncertain which plaintiffs, if any, should be dismissed. Fed. R. Civ. P. 12(d) permits a district court to defer until trial jurisdictional questions raised by a motion

[1] Additional defendants have moved separately to dismiss the amended complaints for lack of subject matter jurisdiction. These additional motions incorporate by reference the arguments made in the motions to dismiss discussed above. The moving defendants are: Combustion Engineering, Inc., Pittsburgh Corning Corp., United States Gypsum Co., Wilkin Insulation Co., Asbestos Corp. Ltd., and Bell Asbestos Mines, Ltd.

filed under Fed. R. Civ. P. 12(b)(1) (lack of jurisdiction over the subject matter).[2] Kaiser Gypsum Company, Inc.'s motion is a Rule 12(b)(1) motion; however, the motion of undersigned defendants is filed pursuant to Rule 12(h)(3). According to Federal Rule of Civil Procedure 12(h)(3):

> a question of subject matter jurisdiction may be presented by any interested party at any time, either by motion or in the answer. Furthermore, it may be interposed as a motion for relief from a final judgment under Rule 60(b)(4) or presented for the first time on appeal. As was stated by the court in *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 169 F.Supp. 774 (D.C. Cal. 1958), *reversed on other grounds*, 362 U.S. 73 (1960): If Federal jurisdiction is not apparent, the Court not only will, but must, refuse to proceed with the determination of the merits of the controversy, *unless this failure can be cured.*"

Wright & Miller, Federal Practice and Procedure § 1393 (footnotes and quotations omitted) (citation and emphasis added).

Any potential jurisdictional problems raised in this case can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000. Caselaw supports postponement.

In *Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988), defendant Velsicol filed two separate Rule 12(b)(1) motions prior to trial arguing that the district court lacked

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[2] Fed. R. Civ. P. 12(d) states in relevant part:

> The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading of by motion . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

subject matter jurisdiction because certain representative plaintiffs and putative class members did not allege that the amount in controversy between each of them and the defendants exceeded $10,000. Velsicol further argued that the district court was required to immediately consider the sufficiency of each plaintiff's claim and dismiss all of those plaintiffs unable to demonstrate a valid claim at that time. The district court deferred the jurisdictional decision with regard to the representative class members until the trial and until the second phase of the trial with regard to the absent class members. The Court of Appeals for the Sixth Circuit affirmed the district court's deferring resolution of the jurisdictional question raised by the defendants' motions. The district court stated:

> [It] also seems to me that it is not necessary at this point for the court to wholesale order a dismissal of all those potential class members who may not at this point have pleaded, because it seems to me that that's a matter that might well come up at some point down the road after the initial phase of the case is tried. . . . [W]hen you get down to establishing amounts in a case such as this, where there is a jury trial, it puts a burden on the court that the court really doesn't want to undertake, and that is an assessment of claims at this point to try and make a determination of whether a jurisdictional amount, in fact, can be asserted at this point. . . .

855 F.2d 1188, 1195 n. 5 (6th Cir. 1988).

Defendants refer to the United States Environmental Protection Agency (EPA) Report,[3] as support for the proposition that approximately sixty percent (60%) of the class member school districts do *not* have a claim in excess of the jurisdictional amount requirement. In other

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[3] EPA, *Evaluation of the Asbestos-in-Schools Identification and Notification Rule*, October, 1984 at XI.

words, the defendants argue that the EPA reported that only 40% of the nation's public school districts and private schools had friable asbestos-containing materials in one or more of their buildings. Plaintiffs respond that the EPA Report does not reflect the fact that, over time, the asbestos that is now known to exist in a percentage of the school buildings, but which is not yet friable, will inevitably become friable. Assuming for the sake of argument that defendants' position is correct, that only 40% of the plaintiff school districts have a claim, the identity of those plaintiffs is still unknown. As discussed above, the best solution is to await trial for the determination of which specific school districts must be dismissed.

Defendants argue that each member of the class must be of diverse citizenship from each defendant in the case. This argument is contrary to law. Long-established Supreme Court precedent establishes that if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse parties are named parties, federal jurisdiction is proper. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969); *see also In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987).

Defendants argue that this court's subject matter jurisdiction is limited by the "local action" doctrine to claims related to property located in Pennsylvania because the doctrine applies to any action directly affecting land and real property. The two main cases cited by defendants, *Dayton Independent School District v. U.S. Mineral Products Co.*, 1987 U.S. Dist. Lexis 6749, (E.D. Tex. 1987) and *Prudential Insurance Co. v. United States Gypsum Co.*, (D.N.J. 1989) (87-4227), involved various products liability and tort claims related to asbesots-containing materials found in buildings. The *Prudential* court assumed, without deciding, that the issue raised was a jurisdictional question;[4] both cases held that the

[4] The local action doctrine has been described both as an issue of subject matter jurisdiction and a question of venue. *Compare*

claims were more appropriately characterized as "transitory" and not "local" in nature because the remedy sought was monetary damages and not recovery of possession or title to real property.

Defendants distinguish *Dayton* and *Prudential* from the case before us by pointing out that questions as to title are present in our case. Defendants suggest that questions regarding the ownership of some of the school buildings in question have been raised since the litigation commenced. For example, defendants suggest that over the years, various school buildings have been sold and the new owners have not been included on the class notice mailing lists.

In the amended complaints, the plaintiffs allege claims of negligence, strict liability, breach of warranties, concert of action, civil conspiracy, intentional tort, restitution and malicious, reckless misconduct. These largely tort claims are, as described above, considered "transtory" in nature. The relief sought in the amended complaints is for monetary damages. Therefore, the local action doctrine does not apply. It is possible that questions related to ownership of some particular buildings may arise later in the litigation. Those particular school districts could be dismissed for lack of subject matter jurisdiction at that point if indeed the local action doctrine is shown to apply. It is premature for the Court to dismiss the amended complaints for lack of subject matter jurisdiction on the basis of the "local action" doctrine as the amended complaints allege claims not bound to any issues of title or possession of real property.

An appropriate order follows.

Hayes v. Gulf Oil Corp., 821 F.2d 285, 290-91 (5th Cir. 1987) (question of subject matter jurisdiction) *with Ralph J. Moscaritolo, Inc. v. Safeway Stores, Inc.*, 743 F.2d 503, 506 (7th Cir. 1984) (question of venue).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 197

[Filed Nov. 15, 1989]

AND NOW, this 14th day of November, 1989, upon consideration of the following motions:

1. Kaiser Gypsum Company, Inc.'s (Kaiser Gypsum) renewal and supplement to its March 31, 1987 motion to dismiss filed pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(f) and 15(a) (Document No. 1341 in Asbestos School Litigation Docket—83-0268 and Document No. 140 in Barnwell Docket—83-1395).

2. The July 26, 1988 motion of undersigned defendants to dismiss for lack of subject matter jurisdiction filed pursuant to Fed. R. Civ. P. 12(h)(3) (Document No. 1333).

3. United States Gypsum Company's (United States Gypsum) motion for leave to file post-hearing memorandum concerning subject matter jurisdiction (Document No. 1674).

4. Certain defendants' motion to dismiss the claims of unnamed class members, and to strike the allegations of class representation from the amended complaints for

failure to plead subject matter jurisdiction (Document No. 1778).

5. Motion of Fibreboard Corporation to dismiss for lack of subject matter jurisdiction (Document No. 1785).

6. Motion of defendant Combustion Engineering, Inc. to dismiss the claims of unnamed class members, and to strike the allegations of class representation from the amended complaints for failure to plead subject matter jurisdiction (Document No. 1796).

7. Motion of defendant, Pittsburgh Corning Corp. to dismiss the claims of unnamed class members and to strike the allegations of class representation from the amended complaints for failure to plead subject matter jurisdiction (Document No. 1797).

8. Motion of defendant United States Gypsum Co. to dismiss for lack of subject matter jurisdiction (Document No. 1800).

9. Motion of defendant United States Gypsum Co. to dismiss for lack of subject matter jurisdiction (Document No. 1801).

10. Motion of Wilkin Insulation Company to dismiss for lack of subject matter jurisdiction (Document No. 1802).

11. Motion of defendant Combustion Engineering, Inc. to dismiss for lack of subject matter jurisdiction (Document No. 1803).

12. Motion of defendants Asbestos Corp., Ltd. and Bell Asbestos Mines, Ltd. to dismiss the claims of unnamed class members and to strike the allegations of class representation from the amended complaint for failure to plead subject matter jurisdiction (Document No. 1831).

13. Motion of defendants Asbestos Corp., Ltd. and Bell Asbestos Mines, Ltd. to dismiss for lack of subject matter jurisdiction (Document No. 1832).

And in consideration of the responses filed thereto by plaintiffs to the above motions, and the various reply memoranda of defendants thereto, and argument presented thereon at the hearing on April 18, 1989, for the reasons set forth in the foregoing Memorandum, it is ORDERED that the aforesaid motions are DENIED.

BY THE COURT:

/s/ James McGirr Kelly
JAMES MCGIRR KELLY
J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

[Filed May 1, 1989]

J. M. KELLY, J. April 28, 1989

Defendants have brought to the attention of the court the possibility of a facial deficiency in the complaints filed in this litigation. Defendants specifically point to the part of the complaints that allege that the amount in controversy requirement set by 28 U.S.C. § 1332(a) has been satisfied.

BACKGROUND

Following exhaustive briefing on the issue of this court's authority to appropriately exercise subject matter jurisdiction over this cause of action and oral argument with supplemental briefing held in consideration of Kaiser Gypsum Company, Inc.'s (Kaiser Gypsum) renewal and supplement to its March 31, 1987 motion to dismiss filed pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(f), and 15(a), the July 26, 1988 motion of undersigned defendants to dismiss for lack of

subject matter jurisdiction filed pursuant to Fed. R. Civ. P. 12(h)(3) and United States Gypsum Company's (United States Gypsum) motion for leave to file post-hearing memorandum concerning subject matter jurisdiction. I must conclude that the complaints filed in this consolidated action are deficient to the extent discussed below.

DISCUSSION

In *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) the Court held that "[e]ach plaintiff in a Rule 23 (b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'" (citation omitted). The court further stated that:

> each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional-amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where *none* of the plaintiffs claims more than $10,000 but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.

Id. at 300 (emphasis in original).

At least two circuit courts may have suggested, albeit indirectly, that a district court must dismiss an entire class cause of action if the court determines that class plaintiffs have not made good faith allegations that *each* class member is entitled to at least $10,000 in damages. *See Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1195 (6th Cir. 1988); *In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987). I must disagree with defendants' proposition that *Zahn* unequivocally requires a district court to dismiss an

entire cause of action if any of the plaintiff class members fails to meet the jurisdictional amount requirement. Certainly, it is clear under *Zahn* that those specific members who do not meet the amount in controversy requirement must be dismissed.

In any event, I note that the complaints presently before the court allege the following: "The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000)." *Lancaster* Second Amended Complaint at 12; *Barnwell* Second Amended Complaint at 13; *Memphis/Napa* Complaint at 15. Plaintiffs have iterated and reiterated their position that a good faith allegation could be made that the vast bulk of class members have claims in excess of the $10,000 jurisdictional amount requirement and that only a few class members exist that may not allege the requisite amount. Defendants dispute plaintiffs' assertion on this point. At oral argument, the defendants referred to United States Environmental Protection Agency (EPA) reports in support of their position that approximately sixty percent (60%) of the class member school districts do *not* have a claim in excess of the jurisdictional amount. Plaintiffs do not cite any authority in support of their position that the number of unnamed plaintiff class members who do not meet the jurisdictional amount requirement is minuscule.

Based on a fair and flexible reading of the complaints, it remains unclear if plaintiffs' assertions regarding the ability of most of the class members to make out a claim that comports with the jurisdictional amount requirement have any merit. Moreover, a plain language reading of the complaints suggests that the aggregated amount in controversy exceeds the sum of $10,000.

In re: Asbestos School Litigation class litigation has proceeded for at least five years. In light of the foregoing and the fact that plaintiffs must ultimately estab-

lish that each of the members of the class has a claim for at least $10,000 in order to maintain this cause of action it would not be premature nor unduly burdensome to require the plaintiffs to correct the existing pleading deficiencies. For the foregoing reasons, plaintiffs' complaints shall be dismissed with leave to amend and the various other motions pending before the court in this action shall be dismissed as moot.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER No. 191

[Filed May 1, 1989]

AND NOW, this 28th day of April, 1989, upon consideration of the briefs filed in this matter, together with arguments presented to the court in oral argument relating to the following motions:

1. Kaiser Gypsum Company, Inc.'s (Kaiser Gypsum) renewal and supplement to its March 31, 1987 motion to dismiss filed pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(f) and 15(a).

2. The July 26, 1988 motion of undersigned defendants to dismiss for lack of subject matter jurisdiction filed pursuant to Fed. R. Civ. P. 12(h)(3).

3. United States Gypsum Company's (United States Gypsum) motion for leave to file post-hearing memorandum concerning subject matter jurisdiction.

It is ORDERED that:

(a) Plaintiffs shall file on or before thirty (30) days from the date of this Order amended complaints which

shall conform to the pleading requirements of 28 U.S.C. § 1332(a) as discussed in the accompanying memorandum opinion.

(b) In the event that plaintiffs do not file amended pleadings in accordance with this Order, the following complaints shall automatically be dismissed:

(1) the complaint captioned *Board of Education of the Memphis City Schools and Napa Valley Unified School District v. U.S. Gypsum, et al.*, originally docketed Civil Action No. 84-2312;

(2) the second amended complaint captioned *School District of Lancaster, Manheim Township School and Lampeter-Strasburg School District v. Lake Asbestos of Quebec, Ltd., et al.*, docketed originally Civil Action No. 83-0268.

(3) the second amended complaint captioned *Barnwell School District No. 45 v. U.S. Gypsum Co., et al.*, docketed Civil Action No. 83-1395 shall automatically be dismissed only with respect to the class allegations therein.

(c) All other outstanding motions shall be held in abeyance pending plaintiffs' filing amended pleadings or dismissal of this action.

BY THE COURT

/s/ James McGirr Kelly
JAMES MCGIRR KELLY
J.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 90-1126

IN RE: SCHOOL ASBESTOS LITIGATION

UNITED STATES GYPSUM COMPANY,
Petitioner

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent

and

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, and a conditionally certified class,

Respondents

No. 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
and NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., UNION CARBIDE

CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES INC., DANA CORPORATION, U.S. GYPSUM, U.S. MINERAL PRODUCTS COMPANY, SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION COMPANY, W.R. GRACE & CO., OWENS-CORNING FIBERGLAS CORPORATION, STANDARD INSULATION, INC., NORTH AMERICAN ASBESTOS CORPORATION, CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWELL LIMITED, THE FLINTKOTE CO., FIBREBOARD CORPORATION, GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORPORATION, BES-TEX, INC., GEORGIA-PACIFIC CORP., UNITED STATES GYPSUM COMPANY,

Appellant

(D.C. Civ. No. 83-00268)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ALDISERT * *Circuit Judges*

The petition for rehearing filed by United States Gypsum Company, Petitioner in 90-1126/Appellant in 90-1248, in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

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* As to panel rehearing only.

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge Hutchinson would grant rehearing by the court in banc. Judge Cowen would grant rehearing by the court in banc for the reasons set forth in his dissents.

BY THE COURT,

/s/ [Illegible]
Circuit Judge

Dated: Jan. 15, 1991

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-0268

SCHOOL DISTRICT OF LANCASTER,
225 West Orange Street
Lancaster, PA 17603

MANHEIM TOWNSHIP SCHOOL DISTRICT,
School Road
Lancaster, PA 17601

and

LAMPETER-STRASBURG SCHOOL DISTRICT,
Lampeter, PA 17537,
Plaintiffs,

v.

LAKE ASBESTOS OF QUEBEC, LTD.,
c/o Corporation Trust Company
100 West Tenth Street
Wilmington, DE 19801

THE CELOTEX CORPORATION,
1500 N. Dale Mabry Highway
Tampa, FL 33607

RAYMARK INDUSTRIES, INC.,
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

UNION CARBIDE CORP.,
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

ASBESTOSPRAY CORP.,
c/o Herbert L. Levin
3215 Avenue H
Brooklyn, NY 11210

SPRAYO-FLAKE COMPANY,
Secretary of State
3rd Floor—Centennial Bldg.
Springfield, IL 62756

NATIONAL GYPSUM CO.,
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA

SPRAYED INSULATION INC.,
c/o Secretary of State of New Jersey
Department of State
P.O. Box 1330
Trenton, NJ 08625

ASBESTOS FIBRES INC.,
c/o Secretary of State of New Jersey
Department of State
P.O. Box 1330
Trenton, NJ 08625

DANA CORP.,
4500 Dorr Street
P.O. Box 1000
Toledo, OH 43615

U.S. GYPSUM,
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

U.S. MINERAL PRODUCTS CO.,
Furnace Street
Stanhope, NJ 07874

SPRAYON INSULATION & ACOUSTICS, INC.,
c/o E. Kempthorne
1390 South Ocean Boulevard
Pompano Beach, FL 33062

SPRAYON RESEARCH CORP.,
c/o E. Kempthorne
1390 South Ocean Boulevard
Pompano Beach, FL 33062

KEENE CORP.,
200 Park Avenue
New York, NY 10017

WORBEN CO., INC.,
c/o Doris M. Haynes
3830 Charleston
Houston, TX 77007

WILKIN INSULATION CO.,
20 North Wacker Drive
Chicago, IL 60606

W.R. GRACE & CO.,
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

OWENS-CORNING FIBERGLAS CORPORATION,
c/o C.T. Corporation System
123 S. Broad Street
Philadelphia, PA 19109

STANDARD INSULATIONS, INC.,
c/o Iris B. Ryder
410 N. Olive Street
Kansas City, MO 64120

NORTH AMERICAN ASBESTOS CORP.,
c/o Herbert C. Brook
115 S. LaSalle Street
Chicago, IL 60603

CASSIAR RESOURCES LTD.,
2000 Guiness TWR
1055 West Hastings
Vancouver V6E3V3
British Columbia, Canada

BELL ASBESTOS MINES, LTD.,
c/o Societe Nationale de l'Amiante
Thetford, Mines,
Quebec, Canada

ASBESTOS CORPORATION LIMITED,
1940 Sun Life Building
Montreal, Quebec
H3B24C Canada

SOUTHERN TEXTILE CORP.,
c/o Corporation Trust Company
100 W. Tenth Street
Wilmington, DE 19801

OWENS-ILLINOIS, INC.,
c/o David A. Ward
One Seagate
Toledo, OH 43666

TURNER & NEWALL LIMITED,
20 St. Mary's Parsonage,
Manchester M3 2NL England

THE FLINTKOTE CO.,
c/o C.T. Corporation System
123 South Broad Street
Philadelphia, PA 19109

FIBREBOARD CORPORATION,
c/o United States Corporation Company
306 South State Street
Dover, DL 19901

GAF CORP.,
229 South State Street
Dover, DE 19901

UNIROYAL, INC.,
Oxford Management and Research Center
Middlebury, CT 06749

CAPE ASBESTOS,
P.O. Box 8644
Johannesburg, Tvl. 2000

PFIZER, INC.,
c/o C.T. Corporation System
277 Park Avenue
New York, NY 10017

KAISER CEMENT CORPORATION,
c/o C.T. Corporation System
800 S. Figueroa Street
Suite 1000
Los Angeles, CA 90017

BES-TEX, INC.,
c/o Eugene M. Hannah
1460 Morena Blvd.
San Diego, CA 92110

and

GEORGIA-PACIFIC CORP.,
c/o C.T. Corporation System
2 Peachtree Street, N.W.
Atlanta, GA 30383,

Defendants.

CLASS ACTION

JURY TRIAL DEMANDED

THIRD AMENDED COMPLAINT

1. Plaintiffs, the School District of Lancaster, the Manheim Township School District and the Lampeter-

Strasburg School District, are public school systems organized and existing under the laws of the Commonwealth of Pennsylvania.

2. The plaintiffs have school buildings and facilities in their possession, custody or control which contain friable or easily damaged asbestos products.

3. The defendants (and/or their predecessors in interest) are all corporations, companies or other business entities which have been and/or are now engaged in the mining, manufacturing or supplying of asbestos or asbestos-containing products.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332:

(a) Plaintiffs are citizens of the Commonwealth of Pennsylvania;

(b) Defendant Lake Asbestos of Quebec, Ltd. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business within the Commonwealth of Pennsylvania;

(c) Defendant The Celotex Corporation is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(d) Defendant Raymark Industries, Inc. is a corporation incorporated under the laws of the State of Connecticut and it does not have its principal place of business in Pennsylvania;

(e) Defendant Union Carbide Corp. is a corporation incorporated under the laws of the State of New York and it does not have its principal place of business in Pennsylvania;

(f) Defendant Asbestospray Corp. was a corporation incorporated under the laws of the State of New York and it does/did not have its principal place of business in Pennsylvania;

(g) Defendant Sprayo-Flake Company was a corporation incorporated under the laws of the State of Illinois and it does/did not have its principal place of business in Pennsylvania;

(h) Defendant National Gypsum Co. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(i) Defendant Sprayed Insulation, Inc. was a corporation incorporated under the laws of the State of New Jersey and it does/did not have its principal place of business in Pennsylvania;

(j) Defendant Asbestos Fibres, Inc. was a corporation incorporated under the laws of the State of New Jersey and it did not have its principal place of business in Pennsylvania;

(k) Defendant Dana Corp. is a corporation incorporated under the laws of the Commonwealth of Virginia and it does not have its principal place of business in Pennsylvania;

(l) Defendant U.S. Gypsum is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(m) Defendant U.S. Mineral Products is a corporation incorporated under the laws of the State of New Jersey and it does not have its principal place of business in Pennsylvania;

(n) Defendant Sprayon Insulation & Acoustics, Inc. is a corporation incorporated under the laws of the State

of New Jersey and it does not have its principal place of business in Pennsylvania;

(o) Defendant Sprayon Research Corp. is a corporation incorporated under the laws of the State of Florida and it does not have its principal place of business in Pennsylvania;

(p) Defendant Keene Corp. is a corporation incorporated under the laws of the State of New York and it does not have its principal place of business in Pennsylvania;

(q) Defendant Worben Co., Inc. was a corporation incorporated under the laws of the State of Texas and it does/did not have its principal place of business in Pennsylvania;

(r) Defendant Wilkin Insulation Co. is a corporation incorporated under the laws of the State of Illinois and it does not have its principal place of business in Pennsylvania;

(s) Defendant W.R. Grace & Co. is a corporation incorporated under the laws of the Sate of Connecticut and it does not have its principal place of business in Pennsylvania;

(t) Defendant Owens-Corning Fiberglas Corporation is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(u) Defendant Standard Insulations, Inc. is a corporation incorporated under the laws of the State of Missouri and it does not have its principal place of business in Pennsylvania;

(v) Defendant North American Asbestos Corp. was a corporation incorporated under the laws of the State of Illinois and it does/did not have its principal place of business in Pennsylvania;

(w) Defendant Cassiar Resources, Ltd. is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(x) Defendant Bell Asbestos Mines, Ltd. is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(y) Defendant Asbestos Corporation Limited is a foreign corporationand it does not have its principal place of business in Pennsylvania;

(z) Defendant Southern Textile Corp. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(aa) Defendant Owens-Illinois, Inc. is a corporation incorporated under the laws of the State of Ohio and it does not have its principal place of business in Pennsylvania;

(bb) Defendant Turner & Newall Limited is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(cc) Defendant The Flintkote Co. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(dd) Defendant Fibreboard Corporation is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(ee) Defendant GAF Corp. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of busines in Pennsylvania;

(ff) Defendant Uniroyal, Inc. is a corporation incorporated under the laws of the State of New Jersey and it does not have its principal place of business in Pennsylvania;

(gg) Defendant Cape Asbestos is a foreign corporation and it does not have its principal place of business in Pennsylvania;

(hh) Defendant Pfizer, Inc. is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(ii) Defendant Kaiser Cement Corporation is a corporation incorporated under the laws of the State of Delaware and it does not have its principal place of business in Pennsylvania;

(jj) Defendant Bes-tex, Inc. is a corporation incorporated under the laws of the State of California and it does not have its principal place of business in Pennsylvania; and

(kk) Defendant Georgia-Pacific Corp. is a corporation incorporated under the laws of the State of Georgia and it does not have its principal place of business in Pennsylvania.

The plaintiff and all members of the class (except a minimal portion thereof), have claims in excess of $10,000 for costs incurred *inter alia* in the inspection of the school buildings, and all other costs incidental thereto, and costs of repairs and replacement plus punitive damages. Entities (not now identified) may exist which own or operate very small school systems in which no friable or potentially friable asbestos-containing material exists and for whom punitive damages may not be recoverable who cannot allege $10,000 in controversy.

5. All the plaintiffs herein reside in the Eastern District of Pennsylvania.

DEFINITION SECTION

6. As used herein, "friable asbestos", "friable asbestos-containing material", and "friable asbestos-containing products" means any asbestos-containing material applied onto ceilings, walls, structural members, piping, ductwork, or any other part of the building structure which, when dry, may be crumbled, pulverized, reduced to powder by hand pressure, or which is otherwise easily damaged.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

J. M. KELLY, J. January 27, 1989

The defendants in this matter have moved for summary judgment pursuant to Fed. R. Civ. P. 56 against class members regarding claims arising from asbestos-containing materials in school buildings built in Virginia before January 17, 1978.

BACKGROUND

Defendants in this action, alleged manufacturers and suppliers of asbestos-containing materials that were used in the school buildings within plaintiffs' school districts, move on the grounds that the Virginia five-year statute of repose for construction defects time-bars the plaintiffs from bringing any claims which relate to the sale or installation of asbestos-containing materials in school buildings built in Virginia before January 17, 1978.[1]

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[1] The applicable Virginia statute of repose, Va. Code Ann. § 8.01-250 (1984) provides in relevant part,

> § 8.01-250. Limitation on certain actions for damages arising out of defective or unsafe condition of improvements to real property.—No action to recover for any injury to property,

DISCUSSION

This court must apply the choice of law rules of the forum state, Pennsylvania. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1308 (3d Cir. 1978); *Klein v. Council of Chemical Associations*, 587 F. Supp. 213, 220 n.2 (E.D. Pa. 1984). Pennsylvania choice of law principles combine an "interest analysis" with the "significant contacts" analysis of the Restatement (Second) of Conflicts of Laws (1971). *Melville*, 584 F.2d at 1313 (3d Cir. 1978); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970). I refer to the general rule adopted in Pennsylvania for choice-of-law questions. In Pennsylvania, "[I] should apply the law of the predominantly concerned jurisdiction, measuring the depth and breadth of that concern by the relevant contacts each affected jurisdiction had with . . . 'the policies and interests underlying the particular issue before the court.'" *Samuelson v. Susen*, 576 F.2d 546, 551 (3d Cir. 1978) (quoting *Suchomajcz v. Hummel Chemical Company*, 524 F.2d 19, 23 (3d Cir. 1975)). But choice-of-law questions involving statutes of limitations is apparently a special area where this general rule may not necessarily apply.

Pennsylvania courts ordinarily apply the Pennsylvania statute of limitations to cases involving disputes over the timely filing of a complaint. *Ross v. Johns-Manville Corp.*, 766 F.2d 823, 826 (3d Cir. 1985); *Freeman v.*

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real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

Lawton, 353 Pa. 613, 46 A.2d 205, 207 (1946).[2] Plaintiffs assert that Pennsylvania courts have been scrupulous in applying the Pennsylvania statutes of limitations and cite to *Ross*, 766 F.2d at 827 in support of this proposition.[3] In light of the fact that this case involves not statutes of limitations, but statutes of repose, and there exists overwhelming indicia of contacts of this cause of action and Virginia, I find that the Virginia statute of repose is applicable and bars plaintiffs' claims with respect to those buildings located in Virginia under Pennsylvania's choice-of-law analysis.[4] This finding is further supported by considerations under the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1 of the Constitution recognized in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, a case involving a class action and the constitutionality of applying the substantive law of the forum state Kansas to all claims filed by the plaintiffs, the Court stated:

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[2] A limited exception to this rule is provided by the Pennsylvania borrowing statute, 42 Pa. Cons. Stat. Ann. § 5521 (Purdon 1981).

[3] Plaintiffs urge the application of Pennsylvania's four year statute of limitations, 42 Pa. Cons. Stat. § 5525 to plaintiffs' contracts claims and Pennsylvania's two year statute of limitations, 42 Pa. Cons. Stat. § 5524, to plaintiffs' tort claims. Plaintiffs argue that Pennsylvania's twelve year statute of repose, 42 Pa. Cons. Stat. § 5536 is inapplicable because section 5536 does not protect manufacturers of building products such as the defendants.

[4] *See School Board of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 326, 327-28 (Va. 1987) (distinguishing statutes of repose and statutes of limitation). At least in tort law, architects' and builders' statutes of repose typically set the commencement of the period of limitation running not when the injury to the complaining party occurs or is discovered, but upon completion of the construction. In this fashion, statutes of repose as to architects and builders often bar the cause of action before it arises and can be asserted. Annotation, *Validity and Construction, as to Claim Alleging Design Defects of Statute Imposing Time Limitations Upon Action Against Architect or Engineer for Injury or Death Arising Out of Defective or Unsafe Condition of Improvement to Real Property*, 93 A.L.R. 3d 1242 (1979).

> . . . the Due Process Clause and the Full Faith and Credit Clause provide[] modest restrictions on the application of forum law. These restrictions require [] 'that for a State's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair.'

Shutts, 472 U.S. at 818 (quoting *Allstate Insurance Co. v. Shutts*, 449 U.S. 302, 312-13 (1981). In *Shutts*, the Court held that application of Kansas contract and Kansas equity law to every claim in the case exceeded constitutional limits given the vast majority of the gas leases and plaintiffs involved in the case had no apparent connection with Kansas other than through the lawsuit. *Id.* at 814-15. In order to ensure that application of Pennsylvania law to this action is not arbitrary or unfair, I must find that there exists a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class to Pennsylvania. *Id.* at 821-22.

It is uncontested that the claims brought by the Virginia class members arise from damage to property (*i.e.*, school buildings) located in Virginia and all the class members asserting claims related to these Virginia school buildings are located in Virginia. In contrast, Pennsylvania contacts to this litigation result only from plaintiffs' choice of forum and the venue of this class action.

Lastly, plaintiffs allege in the complaint and hint in the response to the instant motion for summary judgment that defendants knowingly concealed and misrepresented the hazards posed by friable asbestos-containing products. *See* Complaint at ¶¶ 16, 36, 37. Plaintiffs argue that the Virginia statute of repose should not be applied because

of defendants' alleged fradulent concealment and misrepresentation. Defendants argue that as a matter of Virginia law, fraudulent concealment does not toll the Virginia statute of repose and rely principally on *School Board of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (Va. 1987). However, in *Norfolk*, the Supreme Court of Virginia decided only the question certified and explicitly did not notice the issue raised by plaintiffs with respect to the tolling of Virginia Code section 8.01-250 by defendants' alleged fraudulent concealment. *Id.* at 329. In any event, plaintiffs' response to the instant motion contains insufficient evidence in support of this allegation.[3]

For the foregoing reasons, defendants' motion for summary judgment is granted.

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[3] The single piece of evidence plaintiffs provide in support of this position is a series of photocopies of advertisements of asbestos-containing products. These advertisements, without more, do not demonstrate defendants deliberately or otherwise engaged in any act of fraud or misrepresentation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 167

[Filed Jan. 27, 1989]

AND NOW, this 27th day of January, 1989, in consideration of defendants' motion for summary judgment regarding the Pre-1978 Virginia School Buildings, plaintiffs' response and defendants' reply thereto, for the reasons set forth in the foregoing Memorandum, it is ORDERED that defendants' motion for summary judgment is GRANTED and judgment is entered in favor of defendants and solely against those plaintiffs raising claims against defendants arising from the presence of asbestos-containing products in school buildings built in Virginia before January 17, 1978.

BY THE COURT:

/s/ James McGirr Kelly
JAMES McGIRR KELLY
J.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

J. M. KELLY, J. May 25, 1990

Before the court is the motion of certain defendants for summary judgment against all plaintiff class members from the state of Georgia. Plaintiffs in this action are a nationwide class of more than 35,000 public and private, not for profit elementary and secondary schools. Defendants are or were members of the asbestos industry as miners, manufacturers or suppliers. Plaintiffs seek relief for damages manifested in costs of inspection, containment and removal of friable asbestos containing products from their school buildings. Plaintiffs' further claim that defendants fraudulently concealed the dangers of asbestos and conspired to conceal those dangers.

Defendants' motion for summary judgment relies upon the four year statute of limitations in Ga. Code Ann. § 9-3-30.[1] The complaints in the three consolidated ac-

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[1] Ga. Code Ann. § 9-3-30 provides:

> All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues.

tions all allege that the application of friable asbestos-containing material was banned by December 31, 1978. The initial complaint was filed in this action on January 17, 1983, beyond the four year statute of limitations. Plaintiffs counter that the Equitable Tolling Discovery Rule, Ga. Code Ann. § 9-3-36,[2] is applicable here where plaintiffs alleged fraudulent concealment and conspiracy to conceal the dangers of asbestos.

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. *Id.* at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

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[2] Ga. Code Ann. § 9-3-96 provides:

> If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitations shall run only from the time of the plaintiff's discovery of the fraud.

The parties do not contest the applicable four year statute of limitations and it appears that plaintiffs' allegations of fraud are of the nature that Ga. Code Ann. § 9-3-36 is designed to address. However, plaintiffs' response to the motion for summary judgment provides nothing more than a reiteration of the allegations of fraudulent concealment. They have produced none of the evidence required by Rule 56(e) in support of their tolling position. Accordingly plaintiffs have failed to establish an essential element to the claims of Georgia plaintiffs.

Plaintiffs suggest that discovery into defendants' fraudulent concealment is ongoing, apparently in an attempt to avoid summary judgment as to Georgia plaintiffs through Fed. R. Civ. P. 56(f). Rule 56(f) provides the court with great discretion to deny or continue a motion for summary judgment when evidence in opposition to a motion for summary judgment is unavailable. Rule 56(f) does require affidavits setting forth the reasons that supporting evidence is not available. Plaintiffs have supplied neither reasons nor affidavits and are not entitled to relief from this motion for summary judgment under Rule 56(f).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

PRETRIAL ORDER NO. 238A

[Filed Jun. 6, 1990]

AND NOW, this 5th day of June, 1990, it is ORDERED that Pretrial Order No. 238 is AMENDED as follows:

Judgment is ENTERED in favor of the following defendants:

ACandS
Armstrong World Industries
Asbestos Corporation Ltd.
Asten Group
Basic, Inc.
Bell Mines, Ltd.
Benjamin Foster-Amchem
Brinco Mining
C. Tennant & Sons
Carey Canada, Inc.
Cassiar Resources, Ltd.

The Celotex Corporation

Combustion Engineering

Dana Corporation

Eagle-Picher Industries, Inc.

Empire Ace Insulation Mfg. Corp.

Fibreboard Corporation

Flintkote Company

GAF Corporation

Georgia-Pacific Corp.

H.K. Porter Company

Kaiser Cement Corporation

National Gypsum Company

Owens-Corning Fiberglas Corporation

Pfizer, Inc.

Pittsburg Corning Corp.

Southern Textile Corp.

Standard Insulations, Inc.

T&N plc (formerly Turner & Newall (PLC)), including its branches Turners Asbestos Fibres, Ltd. and J.W. Roberts, Ltd.

Uniroyal, Inc.

U.S. Mineral

W. R. Grace & Co.

and against all Georgia plaintiffs.

BY THE COURT:

/s/ James McGirr Kelly
JAMES MCGIRR KELLY
J.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

J. M. KELLY, J. January 9, 1991

Presently before the court is the motion of certain defendants for summary judgment regarding the claims of the class member schools located in Hawaii and constructed or renovated prior to January, 1973. This class litigation consists of three consolidated actions, the earliest of which was filed January 17, 1983, seeking relief for injuries allegedly suffered as a result of the installation of dangerous asbestos-containing materials in school buildings across the United States. The Plaintiffs have set forth nine counts for relief based in products liability and conspiracy theories.

The defendants here contend that Hawaii's statute of limitations and ultimate repose, Hawaii Rev.Stat. § 657-8, as amended in 1983, operates to bar the claims made by the Hawaii schools. In pertinent part, the statute requires that all actions to recover damages for any injury to property arising out of any neglect in the manufacturing and supplying of material or construction be commenced within two years of the accrual of the cause of action, but in any event not more than 10 years after

completion of the construction.[1] The defendants here argue that since the Complaint in this action alleges that asbestos was used in the construction of the plaintiffs' school buildings only through 1972, the 10-year limit provided by § 657-8 bars this action since the action was commenced on January 17, 1983 at the earliest, more than 10 years after the construction of plaintiffs' buildings was completed according to the Complaint. The defendants argue further that the retroactivity provision included in Hawaii's legislative amendments of 1983 allows the 10-year limitation to be applied to this action in spite of the fact that this action was commenced in January, 1983, prior to the amendment of § 657-8 later that year.

In response, both the plaintiffs as well as the Attorney General for the state of Hawaii have asserted that § 657-8 is violative of equal protection and due process principles of the Hawaii Constitution. In the interest of avoiding unnecessary determinations of constitutional law, and because the Complaint alleges a conspiracy on the part of the defendants to withhold information concerning the dangers of asbestos, I requested that the parties provide this court with supplemental memoranda of law addressing the issue of whether Hawaii Rev.Stat. § 657-20 applies to this action.[2] Hawaii Rev.Stat. § 657-20

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[1] Haw. Rev. Stat. § 657-8 (1983) provides:

No action to recover damages for any injury to property, real or personal, arising out of any deficiency or neglect in the planning, design, suretyship, manufacturing and supplying of material, construction, supervision and administering of construction, and observation of construction relating to an improvement to real property shall be commenced more than two years after the cause of action has accrued, but in any event not more than ten years after the completion of the improvement.

[2] Haw.Rev.Stat. § 657-20 provides:

If any person who is liable to any of the actions mentioned in this part or Section 663-3, fraudulently conceals the existence of the cause of action . . . from the knowledge of the person entitled

(1976) provides for a six-year limitations period commencing when a party discovers or should have discovered a cause of action where the existence of the cause of action was fraudulently concealed from the party entitled to bring the action.

Having considered the parties' supplemental memoranda in conjunction with the prior submissions on the present motion, and for the reasons stated below, I will now grant the defendants' motion for summary judgment.

APPLICABLE STATUTES OF LIMITATION AND REPOSE

The defendants have maintained throughout the pendency of this motion that it is Hawaii's statute of limitations principles that govern the timeliness of the Plaintiffs' claims. A federal court sitting in diversity must apply the choice of law rule of the forum state. *Klaxon v. Stentor*, 313 U.S. 487 (1941); *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Appropriate choice of law analysis must also be applied to the claims of class action plaintiffs. *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). A forum's choice of law rules are followed in determining the applicable statute of limitations. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

Pennsylvania applies a flexible approach to choice of law determinations, weighing the relevant interests of the parties and the forum state, as well as the contacts with the prospective states in light of the issues involved. *Compagnie des Bauxites de Guinee v. Argonaut-Midwest Insurance Co.*, 880 F.2d 685, 688-9 (3d Cir. 1989); *Griffith v. United Airlines*, 203 A.2d 796 (1964). Through-

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to bring the action, the action may be commenced at any time within six years after the person who is entitled to bring the same discovers or should have discovered the existence of the cause of action . . . although the action would otherwise be barred by the period of limitations.

out the pendency of this litigation applicable state law from the jurisdictions where plaintiffs are located has been referred to in consideration of pretrial motions bearing on the various state law claims asserted in the Complaint. The current motion addresses the claims of plaintiffs located in Hawai. Any asbestos-containing materials present in Hawaii schools were installed in that state and any abatement or repair will take place there. These contacts are such that the laws of Hawaii, including its statutes of limitation and repose are properly applied by this court.

This court is satisfied that Hawaii Rev.Stat. § 657-20 may apply to toll the 10-year limit in cases of fraudulent concealment. Hawaii's policy regarding the effect of fraudulent concealment on statutes of limitation is made clear by the existence of this tolling statute, as well as the existence of Hawaii's common law "lulling" doctrine enunciated in *Mauian Hotel v. Mauian Pineapple Co.*, 52 Haw. 563, 481 P.2d 310 (1971). The defendants argue in opposition that § 657-20 does not toll the 10-year "repose" element of § 657-8, but only affects the two-year "limitations" period that applies to the date a cause of action accrues. However where fraudulent concealment exists, section 657-20, by its text, allows a plaintiff six years from the time he discovers or should have discovered a cause of action . . . "although the action would otherwise be barred by the period of limitations." The ten-year limit imposed by section 657-8 is just such a provision, under which the present action would "otherwise be barred."

For purposes of tolling under section 657-20, attempts to disinguish between statutes of limitation and statutes of repose are not persuasive. The fact that Hawaii's statute limitation for medical malpractice actions contains its own tolling provision does not prevent application of Hawaii's general tolling statute, section 657-20, to limitations provisions such as 657-8 that do not contain

specific tolling policies. If anything, the existence of the specific tolling provision for medical malpracitce actions (section 657-7.3), which provision operates to toll a limitation period similar in nature to that of section 657-8, suggests that tolling is appropriately applied to "in any event" limitations periods. In the absence of specific tolling policy within the text of section 657-8, it is proper to apply the general tolling policy of section 657-20.

Having determined that section 657-20 may be applied to toll the limitations periods set forth in section 657-8, the issue arises as to whether sufficient evidence of fraudulent concealment has been presented such that section 657-20 is invoked. The plaintiffs have alleged a long-time conspiracy on the part of the defendants to conceal knowledge of the dangers of asbestos. Throughout this litigation the plaintiffs have illustrated this allegation with claims that the defendants, through their involvement in various asbestos studies, industry trade associations, as well as meetings with federal officials, have purposely sought to prevent the disclosure of information regarding asbestos risks.

As pointed out by both the plaintiffs and the defendants however, "fraudulent concealment" for purposes of section 657-20 is the "employment of artifice, planned to prevent inquiry or escape investigation . . . The act relied upon must be of an affirmative character and fraudulent." *Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981). Mere allegations of fraudulent concealment are insufficient to survive the motion for summary judgment. A genuine issue of fact must exist with regard to fraudulent concealment by the defendants in order for the plaintiffs to survive the motion for summary judgment on the grounds that section 657-20 tolls the limitations period in section 657-8. None of the evidence presented by the plainitffs suggests an affirmative act of fraud by the defendants, intended to conceal a cause of action and on which the plaintiffs relied. Thus on the facts of record

before this court, section 657-20 does not toll section 657-8.

CONSTITUTIONALITY OF SECTION 657-8

The plaintiffs and the Hawaii Attorney General have asserted that the Supreme Court of Hawaii would find that section 657-8 violates equal protection and due process principles of Article I of the Hawaii Constitution and that this court must do the same. In support of the equal protection argument, Plaintiffs cite Hawaii Supreme Court opinions attacking the constitutionality of previous versions of section 657-8 on equal protection grounds. However cases such as *Shibuya v. Architects Hawaii Ltd.*, 65 Haw. 26, 647 P.2d 276 (1982), attacked prior versions of section 657-8 for disparate treatment of certain defendants. Moreover, the *Shibuya* court was careful to point out that although it was troubled by section 657-8, it would be improper for the court to substitute its judgment for that of the state legislature; if Hawaii's duly elected representatives choose to favor one segment of society over another as a matter of policy in order to combat rising construction costs, then that is within their discretion so long as the bounds of equal protection are not crossed. *See Shibuya, supra*, 647 P.2d at 286. Prior versions of section 657-8 were reviewed with disfavor because their limited application to certain types of defendants had forced other defendants to bear the burden of potential liability alone. The amended 1983 version of section 657-8 at issue here effects no differential treatment among defendants that bears on this litigation. As the defendants point out, all defendants to this action are covered by section 657-8. Thus the equal protection difficulty which had arisen in past with respect to particular defendants affected by section 657-8 does not exist here.

Additionally, an issue of standing arises concerning the plaintiffs' attempts to invalidate section 657-8 based on

the provision of the statute, whether contained in present or past versions, that differentiates between certain types of potential defendants. The Supreme Court has explained that the crucial inquiry in determinations of standing is "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant the invocation of . . . [the court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. at 498-99 (1975). While section 657-8 does significantly affect the plaintiffs' ability to pursue relief, that effect results from the statute's 10-year limitation policy, and not from the fact that the statute makes distinctions among defendants to whom that policy is applied. Since the plaintiffs are not the object of the statute's distinctions regarding its application to potential defendants and cannot claim to be deprived of any more favorable treatment enjoyed by others as a direct result of the statute, the plaintiffs may not be the proper party to seek redress in the event that the distinctions made by section 657-8 violate equal protection principles of the Hawaii Constitution.

The plaintiffs also assert that the application of section 657-8 to property damage actions violates equal protection because personal injury actions are not affected. This distinction does not implicate a suspect class nor a fundamental right. If the distinction is rationally related to a legitimate government interest it does not violate equal protection. *Wayne v. Tennessee Valley Authority*, 730 F.2d at 392, 404 (5th Cir. 1984). The Hawaii legislature viewed section 657-8 as a means of exerting some control on the rising costs of housing. *See* Stand. Comm. Rept. No. 490, Haw. S.J. 1256 (1983), Stand. Comm. Rept. No. 825, Haw. S.J. 1220 (1983). This is a legitimate government interest to which the enaction of a limitations period such as section 657-8 may be seen as rationally related. Any distinction between personal injury and damage to property is thus not violative of equal protection principles.

Plaintiffs' due process arguments do not persuade this court either. First, there is no absolute and unlimited constitutional right of access to courts. All that is required is a reasonable right of access. *Wayne v. Tennessee Valley Authority*, 730 F.2d at 403. The ten-year limitation period set forth in section 657-8 does not deny this right. In *Yoshizaki v. Hilo Hospital*, 50 Haw. 150, 433 P.2d 220 (1967) the Hawaii Supreme Court indicated that such limitations are within the legislative authority.[3]

Second, retroactive application of section 657-8 to this litigation, which litigation was pending at the time of section 657-8's most recent amendment, would not likely be deemed a violation of due process by Hawaii's highest court. The Hawaii Attorney General points out Hawaii's established policy to the effect that statutes may not operate retroactively unless clear statutory language dictates such application. *See* Haw.Rev.Stat. section 1-3. The Hawaii legislature provided just such specific direction however when it specified that the 1983 legislative amendments were to be applied to actions pending on the date of their approval.[4] Further, the Hawaii Supreme Court reviewed the retrospective application of an earlier version of section 657-8 without criticism in *Shibuya*, *supra*, 647 P.2d 276. This court thus concludes that Hawaii's highest court would not strike down the retroactive application of section 657-8 to this action as violative of equal protection or due process principles of Article I of the Hawaii Constitution. The defendants' motion for summary judgment will thus be granted; the claims of the Hawaii class plaintiffs will be dismissed as untimely under Haw.Rev.Stat. section 657-8.

An appropriate order follows.

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[3] The court in *Yoshizaki* allowed that if the legislature "wishes to place an outside limit on the time for bringing a malpractice action, it is free to do so." *Id.* at 224.

[4] *See* S.L.H. 1983, c.120, § 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

PRETRIAL ORDER NO. 277

AND NOW, this 9th day of January, 1991, in consideration of certain Defendants' motion for summary judgment, the Plaintiffs' response thereto, as well as supplemental memoranda of law submitted by the parties and the opinion of the Attorney General for the state of Hawaii, it is ORDERED that the motion is GRANTED. Judgment is entered in favor of the following defendants:

ACandS, Inc.

Armstrong World Industries, Inc.

Asbestos Corporation Limited

Asten Group, Inc.

Basic, Inc.

Bell Asbestos Mines, Ltd.

Benjamin Foster-Amchem

Brinco Mining Ltd.

Cassiar Resources Ltd.

C. Tennant & Sons

Combustion Engineering, Inc.

Dana Corp.

Eagle-Picher Industries, Inc.

Empire Ace Insulation Mfg. Corp.

Fibreboard Corporation

Flintkote Company

GAF Corp.

Georgia-Pacific Corp.

H.K. Porter Co.

Kaiser Cement Corporation

Keene Corp.

Owens-Corning Fiberglas Corporation

Pfizer, Inc.

Pittsburgh Corning Corp.

Rock Wool Manufacturing Co., Inc.

Southern Textile Corp.

T&N plc (formerly Turner & Newall (PLC)) including its branches, Turner Asbestos Fibres, Ltd. and J.W. Roberts, Ltd.

Union Carbide Corp.

Uniroyal, Inc.

U.S. Mineral Products Co.

W.R. Grace & Co.—Conn.

Wilkin Insulation Co.

and against all Hawaii Plaintiffs.

BY THE COURT:

/s/ James McGirr Kelly
JAMES MCGIRR KELLY
J.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

[Filed Jan. 22, 1990]

J. M. KELLY, J. January 19, 1990

Presently before the Court is the motion of National Gypsum Company (National Gypsum) for reconsideration of Pretrial Order No. 183. Pretrial Order No. 183 granted National Gypsum's motion for an order restraining certain school districts from individually litigating their asbestos-in-schools claims (Doc. No. 1383) to the extent that the following four school districts only were enjoined from asbestos-related litigation against National Gypsum in any other forum during the pendency of this class action: the School District of Lancaster, Pennsylvania, Manheim Township School District, Pennsylvania, Lampeter-Strasburg School District, Pennsylvania, and Northeastern School District, Pennsylvania.

Pretrial Order No. 90, with the accompany Notice, set forth the class opt-out procedure to be followed by the parties. The procedure described is very simple. Those

plaintiff school districts not intending to remain in the class were directed to sign the exclusion request form and mail the form to the Clerk of Court by December 1, 1987.

Pretrial Order No. 183 did not enjoin the following four school districts: Livingston Independent School District, Texas (Livingston); School District of Flint, Genesee County, Michigan (Flint); Akron City Schools District, Ohio (Akron); Shelby County Board of Education, Tennessee (Shelby). National Gypsum has recently filed the motion for reconsideration of Order No. 183 urging the Court to enjoin these additional four school districts for failure to opt-out of the class.

On December 12, 1989, this Court held a hearing on National Gypsum's motion to enjoin. At the hearing, counsel for Flint, Akron, and Livingston argued that each of these school districts should not be enjoined since each would file a sworn affidavit by the school official who could aver that he mailed the exclusion request form in compliance with this Court's Order and Notice. Counsel for Shelby submitted to the Court a statement of Shelby's intent to remain in the class.

However, Flint's individual response to National Gypsum's motion to enjoin includes an affidavit of Charles T. Towar (Towar), Director of Facilities Planning for the School District of the City of Flint, Genesee County, Michigan. Towar avers that a school district employee mailed the exclusion form. I note that Flint has not submitted an affidavit from the unnamed employee who allegedly mailed the form. Therefore, the affidavit supplied by Flint does not adequately support the conclusion that the form was timely mailed.

Akron's individual response includes an affidavit of Akron's counsel, Donald A. Powell (Powell). In his affidavit, Powell avers that Akron mailed the exclusion form to his office, but that Powell never received the exclusion form. This affidavit is wholly inadequate for the purposes

of demonstrating Akron complied with the opt-out procedure. No affidavit was included with Akron's individual response to the motion for reconsideration.

It appears from the record that Livingston has not filed a response to either National Gypsum's motion to enjoin or the instant motion for reconsideration. Since the hearing, it appears that none of the subject school districts have filed any affidavit or other evidence in support of assertions made by counsel at the hearing.

For the foregoing reasons, the Court will grant National Gypsum's motion for reconsideration of Pretrial Order No. 183. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER NO. 205

[Filed Jan. 22, 1990]

AND NOW, this 19th day of January, 1990, upon consideration of the motion of National Gypsum Company for reconsideration of Pretrial Order No. 183 and the response of Akron City School District thereto, for the reasons set forth in the foregoing Memorandum, it is ORDERED that the motion of National Gypsum is GRANTED.

In addition to those school districts restrained from individual litigation by Pretrial Order No. 183, the following school districts are additionally enjoined and stayed from litigating against National Gypsum Company any individual, class or derivative claims, arising out of or relating to the matters set forth in the complaints in this action, in any forum other than this Court, during the pendency of this class action:

Livingston Independent School District, Texas

School District of Flint, Genesee County, Michigan

Akron City Schools District, Ohio

Shelby County Board of Education, Tennessee

BY THE COURT:

/s/ James McGirr Kelly
JAMES MCGIRR KELLY
J.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM AND ORDER

[Filed Feb. 20, 1990]

J. M. KELLY, J. February 16, 1990

The plaintiffs and Lac D'Amiante du Quebec, Ltee (LAQ), one of 50 defendants remaining in this action, reached an agreement for partial settlement of this matter on March 31, 1989. The terms of the agreement call for LAQ to pay $1,000,000.00 (one million dollars) to the class. In exchange, the class members will dismiss their claims against LAQ with prejudice and agree to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ. On November 22, 1989, the court preliminarily approved settlement of plaintiffs' claim against LAQ and ordered notice of the proposed settlement to be mailed to all members of the class on or about December 29, 1989. Any class member objecting to the proposed settlement was given until January 28, 1990 to file their objection and, if desired, notice of their intention to appear at the hearing on final approval of the settlement. A hearing was held on Febru-

ary 12, 1990 and the court makes the following determination pursuant to Fed. R. Civ. P. 23(e).

Rule 23(e) requires the court to review the proposed settlement to make sure that the rights of the absent class members are not jeopardized by the settlement.[1] The court, by approving the settlement, finds the settlement to be fair, reasonable and adequate to all members of the class. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3rd Cir. 1974). This does not mean that the court should substitute its judgment for that of the members of the class. 7b C. Wright, A. Miller & M. Kane *Federal Practice and Procedure*, § 1797 (1986). Any doubts about settling should also be tempered by the general policy favoring settlement. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1985).

Factors that should be considered in approving or disapproving class settlements include:

1. The complexity, expense and likely duration of the litigation.

2. The reaction of the class to the settlement.

3. The stage of the proceedings and the amount of discovery completed.

4. The risks of establishing liability.

5. The risks of establishing damages.

6. The risks of maintaining the class action through the trial.

7. The ability of the defendants to withstand a greater judgment.

8. The range of reasonableness of the settlement fund in light of the best possible recovery.

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[1] Rule 23(e) states:

Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

9. The range of reasonableness of the settlement fund to a possible recovery in light of all the possible attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975), *quoting, City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974).

Complexity

The complexity of this action is unquestioned. The plaintiff class is comprised of in excess of 35,000 public and not for profit private schools and school districts. The 52 original defendants represent most of the miners, millers, suppliers and manufacturers of friable asbestos building products. The case was originally filed in 1983, almost seven years ago. Class certification appeals were taken to the Supreme Court. The Third Circuit has stated that the facts giving rise to this case represent "an unprecedented situation. . . ." *In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3rd Cir.), *cert. denied*, 479 U.S. 915 (1986).

Class Reaction

Three members of the class filed objections to the settlement, one of which was withdrawn prior to the February 12, 1990 hearing.

Redmond School District of Redmond, Oregon objected that the settlement amount was too small when apportioned pro rata among the various members of the class. In light of LAQ's position in the asbestos industry and peripheral involvement in this case, discussed *infra*, this settlement amount appears to be adequate.

The Akron City School District Board of Education (Akron) also filed an objection to the proposed settlement. Akron's objection is founded upon its uncertainty concerning its status as a member of the class. On March 27, 1989, Pretrial Order No. 183 was entered enjoining several class members from litigating individual claims

against National Gypsum. Although National Gypsum sought an injunction against Akron, Akron was not enjoined. Upon reconsideration of Pretrial Order No. 183, Pretrial Order No. 205 was issued and Akron was enjoined from pursuing its individual claim. While Akron acted quickly in filing its objection in order to preserve its right to inspect the settlement agreement, the right to supplement its objection was specifically reserved. *Akron Memorandum in Opposition to Proposed Settlement*, at 3. Since filing their objection, Akron has discovered no reason to question the fairness, reasonableness or adequacy of the LAQ settlement. Whether or not Akron's motion for Reconsideration of Order 205 is granted, Akron stands to lose nothing as a result of the LAQ settlement since Akron has agreed to dismiss LAQ as a defendant in its individual action. *Akron City School District Board of Education v. Armstrong World Industries*, No. CV 85 4 1242, Order (Ohio C.P. May 19, 1989).

The Stage of the Proceedings

Plaintiffs and LAQ have completed considerable discovery in order for plaintiffs to evaluate the relative strengths and weaknesses of their case against LAQ.

Risk of Establishing Liability

Plaintiffs recognize that they face a significant risk in attempting to establish liability against LAQ. LAQ, as a miner of asbestos, will assert unique defenses. For example, LAQ has indicated that it would assert that it sold a raw material to sophisticated buyers that materially altered the product, thereby making them not liable. Further, discovery has shown that LAQ started mining asbestos after 67% of the plaintiffs' schools had been built, that 70% to 75% of LAQ's product was sold overseas and that LAQ mined a fiber unsuitable for the friable asbestos-containing products at issue in this action.

Risk of Establishing Damages

Along with their peripheral position in this litigation, LAQ has compiled an impressive record in asbestos property damage actions. Of the approximately 90 actions filed against LAQ, it remains as a defendant in only about 20. In none of these actions has LAQ been held liable. In fact, LAQ has previously settled only one asbestos property damage claim. Against this background, plaintiffs would be justified in determining that the task of establishing damages against LAQ is herculean.

Maintaining the Class Action

The risks of maintaining the class action through the trial cannot be discounted. Defendants have vigorously fought the certification of the class and have asserted numerous procedural and substantive defenses. In an action this complex, plaintiffs can never be assured of an eventual victory at trial.

Withstanding a Greater Judgment

While it is not disputed that LAQ could financially withstand a greater judgment, given LAQ's peripheral position in this action, withstanding a greater judgment is not an issue in approving this settlement.

Reasonableness of the Settlement Fund

In light of all of the risks of continuing against LAQ, the recovery in this settlement appears to the court to be very reasonable.

Defendants' Objections

Generally, non-settling defendants have no standing to object to a proposed settlement since they would have no standing to appeal. Pretrial Order No. 66 provides the only exceptions are when the rights of non-settling defendants are prejudiced by the settlement or non-set-

tling defendants are precluded from seeking indemnification from settling defendants. *See, In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979). The non-settling defendants have failed to show that either of these exceptions are applicable here.

Accordingly, I find the proposed settlement agreement to be fair, reasonable and adequate for the members of the class. Plaintiffs' motion to strike the objections of the non-settling defendants is dismissed as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

JUDGMENT PURSUANT TO F.R.CIV.P. 54(b) AND PRETRIAL ORDER NO. 212 FINALLY APPROVING 1989 AGREEMENT OF SETTLEMENT WITH DEFENDANT LAC D'AMIANTE DU QUEBEC, LTEE

[Filed Feb. 20, 1990]

WHEREAS, certain class actions consolidated as *In re Asbestos School Litigation*, Master File No. 83-0268 (E.D. Pa.) (hereinafter, the "Class Actions"), have been filed in this Court on behalf of an asserted class (hereinafter, the "Class") alleged therein against, *inter alia*, Lac d'Amiante Du Quebec, Ltee (hereinafter "LAQ").

WHEREAS, on March 31, 1989, class plaintiffs and defendant LAQ (hereinafter, "Settling Defendant") entered into a settlement agreement, entitled "Settlement Agreement With Defendant Laq d'Amiante Du Quebec, Ltee" (hereinafter, the "Partial Settlement");

WHEREAS, on November 22, 1989, Pretrial Order No. 198 was entered by this Court preliminarily approving the Partial Settlement and directing that notice be given to the class of the proposed Partial Settlement, and

of a hearing to determine whether the proposed Partial Settlement should be approved as fair, adequate and reasonable and to hear any objections thereto;

WHEREAS, such a hearing was held, as noticed, on February 12, 1990, and, prior to the hearing, proof of notice of the proposed Partial Settlement was presented and filed, on February 9, 1990;

WHEREAS, notice of the Partial Settlement was sent to all members of the Class certified in Pretrial Order No. 20, excluding all schools which filed a request to be excluded from the class pursuant to Fed.R.Civ.P. 23(c)(2), which notice advised class members of their right to appear at the hearing in support of or in opposition to the proposed Partial Settlement;

WHEREAS, the Court has heard counsel on behalf of the parties, and has reviewed all of the submissions presented with respect to the proposed Partial Settlement.

NOW, THEREFORE, on this 16th day of February, 1990, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The members of the Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 20, excluding all schools which filed a timely and valid request to be excluded from the Class pursuant to Fed.R. Civ. P. 23(c)(2).

2. The Partial Settlement is in all respects fair, adequate, reasonable and proper, and in the best interests of the Class, and is approved.

3. Notice of the proposed Settlement, as required by Rule 23(e) of the Federal Rules of Civil Procedure, has been given in an adequate and sufficient manner, complying in all respects with such Rules and due process, including, but not limited to, the forms of notice and the methods of identifying and giving notice to the Class.

4. Except as provided herein, these Class Actions are dismissed with prejudice and on the merits and without costs only to Settling Defendant. This dismissal shall apply to these class actions and all claims, demands, rights or causes of action (including all claims for punitive damages, costs, expenses or fees), present or future, known and unknown relating to asbestos and asbestos-containing materials, which the class, individually or collectively, and their predecessors or successors, or any of their past or present representatives, assigns, subsidiaries, divisions, affiliates, parents, partners, officers, directors, employees or agents, had, now has or hereinafter can, shall or may have against LAQ or any other person in connection with, arising out of, based in whole or in part on, or in any way related to facts, matters, acts of commission or omission, statements, agreements or occurrences which were asserted or could have been asserted in any of the complaints and ameded complaints in these class actions (hereinafter, the "Claims").

5. Plaintiffs and each and every member of the Class are hereby deemed to have constructively released all Claims against LAQ as if they had individually executed a Release and Covenant Not to Sue in the form of Exhibit A attached to the Partial Settlement agreement and incorporated herein.

6. Jurisdiction is hereby retained as to all matters related to the administration and consummation of the Partial Settlement hereby approved.

7. This Order and the Partial Settlement are not intended and are not to be construed as a release or dismissal by plaintiffs and Class Members of any claims or rights which any of them have or may have against any non-settling defendant or defendants.

8. The Court finds that there is no just reason for delay in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Clerk

of the District Court is directed to enter this Judgment. Certification under Rule 54(b) will not result in unnecessary appellate review nor will review of the adjudicated claims moot any further developments in this case. Even if subsequent appeals are filed, the nature of these claims are such that the appellate court would not have to decide the same issue more than once.

It is further ORDERED that plaintiff's motion to strike the objections of certain defendants is DISMISSED AS MOOT.

BY THE COURT:

/s/ James McGirr Kelly
JAMES McGIRR KELLY
J.

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1125/1126 & 1185

IN RE: SCHOOL ASBESTOS LITIGATION

KAISER GYPSUM COMPANY, INC.,
Petitioner No. 90-1125

vs.

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent No. 90-1125

and

BARNWELL SCHOOL DISTRICT NO. 45,
Respondent No. 90-1125

IN RE: SCHOOL ASBESTOS LITIGATION

UNITED STATES GYPSUM COMPANY,
Petitioner Nos. 90-1126

vs.

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent Nos. 1126

and

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, and a Conditionally certified class,
Respondents Nos. 90-1126

• • • •

[42] MR. BERGER: Oh. It was to clarify the class by saying only those with friable asbestos. And let me say this—

THE COURT: And when you say "friable asbestos," you're referring to the matter before Congress indicating that these are over $10,000. Is that what you're saying?

MR. BERGER: No. We're saying—

THE COURT: I am asking. I'm not quizzing—

MR. BERGER: No, I know. I didn't quite understand, Your Honor, about—

THE COURT: I'm just trying to get some factual information of the nature of the motion before the District Court.

MR. BERGER: The nature of the motion before the District Court is to clarify that the class consists of all members, i.e., school districts or school systems, which have one or more buildings containing friable asbestos. And once you do that, that virtually eliminates virtually everybody that—of whom it could in good [43] faith be said that they don't have a claim of $10,000 or more. That's what the point is.

MR. BERGER: That's what I was saying in a very inelegant—

THE COURT: I suspected as much, but I was . . . thank you. That helps.

MR. BERGER: And, Your Honor, to answer the second prong of your question, our position is, with respect to the colloquy, we don't need that motion to be granted here or down below to satisfy jurisdictional diversity of citizenship and amount.

THE COURT: Well, we understand that's your basic position, but your back-up position in the motion you filed here as well as the one you have pending before the District Court is that, in effect, you want the class redefined.

MR. BERGER: Now, the class—

THE COURT: That's the bottom line of it. You're redefining the class, right?

MR. BERGER: We were defining—

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1185

FIBREBOARD CORPORATION,
Petitioner,

v.

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, and a Certified Class,
Respondents.

IN RE: ASBESTOS SCHOOL LITIGATION

D.C. Master File 83-0268

CLASS PLAINTIFFS' CONSOLIDATED ANSWER TO PETITIONS FOR WRITS OF MANDAMUS AND PROHIBITION FILED BY KAISER GYPSUM CORPORATION, UNITED STATES GYPSUM CO., AND FIBREBOARD CORPORATION

HERBERT B. NEWBERG
HARVEY S. KRONFELD
GERALD A. WALLERSTEIN
SANDRA D. DUGGAN
HERBERT B. NEWBERG, ESQ., P.C.
227 S. 6th Street, Suite 200
Philadelphia, PA 19106
(215) 922-4740

DAVID BERGER
HAROLD BERGER
WARREN D. MULLOY
THOMAS F. HUGHES
DAVID BERGER
ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Co-Lead Counsel For Class Plaintiffs

• • • •

25. Recent Supreme Court case law cited by petitioners does not *sub silentio* eliminate this general rule.

26. Not all additions of nondiverse parties are barred. The Supreme Court itself has held in a variety of circumstances that complete diversity is not required, *i.e.*, in class actions and intervention as of right. *Snyder v. Harris*, 394 U.S. 332 (1969).

27. Not requiring complete diversity for absent class members is in accord with judicial economy, fairness and desirability of certainty in the law.

28. The Federal Rules of Civil Procedure would be negatively implicated by any general rule requiring complete diversity. "Independent jurisdictional grounds are not required if intervention is of right under Rule 24 (a)." 7C Wright & Miller, *Federal Practice and Procedure: Civil 2d*, § 1917 (1986).

29. Such a general rule would also contravene, by implication, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 532 (1974).

30. Also, reliance upon the concept of pendent jurisdiction is unnecessary here because this case falls squarely within the traditional rule.

VII. *No Requirement Exists For Each Class Member To Have In Excess Of $10,000 In Claims Against Each Defendant.*

31. The argument that each class members [sic] must have a claim in excess of $10,000 against each defendant is, in the context of class actions, frivolous and is directed more properly toward an assertion of pendent party jurisdiction or aggregation • • •

• • • •

(3) (2) (2)

Nos. 90-1367, 90-1368, 90-1378

Supreme Court, U.S.
FILED
MAR 29 1991
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In the

Supreme Court of the United States

October Term, 1990

KAISER CEMENT CORPORATION,
Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., et al.,
Respondents.

W.R. GRACE & CO., et al.,
Petitioners,

v.

BARNWELL SCHOOL DISTRICT NO. 45, et al.,
Respondents,

and

The Honorable James McGirr Kelly,
Nominal Respondent.

UNITED STATES GYPSUM COMPANY, et al.,
Petitioners,

v.

BARNWELL SCHOOL DISTRICT NO. 45, et al.,
Respondents,

and

The Honorable James McGirr Kelly,
Nominal Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Herbert B. Newberg*
Harvey S. Kronfeld
Sandra L. Duggan
Roger P. Cameron
HERBERT B. NEWBERG, ESQ., P.C.
510 Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 922-4740

David Berger*
Harold Berger
Warren D. Mulloy
Howard I. Langer
Thomas F. Hughes
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Co-Lead Counsel for Respondents - Class Plaintiffs
*Counsel Of Record

Of Counsel:

Charles Alan Wright, Esquire
727 E. 26th Street
Austin, TX 78705

Arthur R. Miller, Esquire
1545 Massachusetts Avenue
Cambridge, MA 02138

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

Arnold Levin, Esquire
Laurence S. Berman, Esquire
Levin, Fishbein, Sedran & Berman
320 Walnut Street, Suite 600
Philadelphia, PA 19106

Chair, Trial and Liability Committee for Respondents - Class Plaintiffs

Stanley J. Levy, Esquire
Levy Phillips & Konigsberg
90 Park Avenue, 31st Floor
New York, NY 10016

W. Robert Morgan, Sr., Esquire
Morgan Law Offices
1651 North First Street
San Jose, CA 95112

Alvin B. Lewis, Jr., Esquire
Hartman, Underhill & Brubaker
221 East Chestnut Street
Lancaster, PA 17602

Ellen Chapnick, Esquire
Wolf Popper Ross Wolf & Jones
845 Third Avenue
New York, NY 10022

Daniel A. Speights, Esquire
Speights & Runyan
304 Lee Avenue
P.O. Box 685
Hampton, SC 29924

Edward J. Westbrook, Esquire
Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street, Suite 600
Charleston, SC 29402

E. Robert Wright, Esquire
Thomas, Snell, Jamison,
Russell, Williamson & Asperger
2445 Capital St., P.O. Box 1461
Fresno, CA 93716

Frank J. Daily, Esquire
Quarles & Brady
411 E. Wisconsin Avenue
Milwaukee, WI 53202-4497

Zell Davis, Jr., Esquire
McGee Jordan Shuey,Gordon
Morris & Doner, P.A.
2328 10th Ave, North, Ste 300
Lake Worth, FL 33461Robert E.

Ernest G. Kelly, Jr., Esquire
Evans, Petree, Cobb & Edwards
81 Monroe Avenue, Ste. 600
Memphis, TN 38103

Sweeney, Esquire
1500 Alluminating Building
55 Public Square
Cleveland, OH 44113

Martin Greitzer, Esquire
Greitzer & Locks
1500 Walnut St., 21st Floor
Philadelphia, PA 19102

Respondents-Class Plaintiffs' Executive Committee

Dated: March 29, 1991

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CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUMMARY OF ARGUMENT

This Brief is a consolidated response to three separate petitions for writs of certiorari (Nos. 90-1367, 90-1368 and 90-1378) to review decisions of the Third Circuit on issues of class certification. This class action is a part of the multitude of litigation arising out of asbestos, an unparalleled situation in American tort law and an unprecedented challenge to traditional methods of judicial administration.

This action was commenced more than eight years ago, seeking to recover for property damage resulting from the use of asbestos in school districts throughout the country. In 1984 the district court certified a class action pursuant to Civil Rule 23(b)(3) and, on an appeal allowed under 28 U.S.C. § 1292(b), that part of the district court's order was affirmed by the Third Circuit in 1986.[1] As Judge Weis wrote then,

> our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The district court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date.

789 F.2d at 1011. This Court denied two separate petitions for writs of certiorari seeking to set aside that decision.[2]

In the five years since then much progress has been made. Discovery has revealed the facts and significantly narrowed the issues. Settlements totaling in excess of $40 million have been reached between the class and six of the defendants. The district court is ready to begin trial this Summer or early Fall, 1991.

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1. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986).

2. *Celotex Corp. v. School District of Lancaster*, 479 U.S. 852 (1986); *National Gypsum Co. v. School District of Lancaster*, 479 U.S. 915 (1986).

Some defendants, having previously tried unsuccessfully to prevent this case from going forward as a class action, have now attempted once more to thwart the efforts of the district court to cope with the unprecedented situation this case presents. The Third Circuit has rebuffed their attempts to use the extraordinary writs of mandamus and prohibition to reargue the propriety of class treatment of this action.[3] Now they come yet again to this Court and ask it to put an end to the fruitful and imaginative efforts of the district court.[4]

W.R. Grace petitioners, **No. 90-1368**, seek certiorari to review both the trial court's discretionary, interlocutory ruling denying their motion for class decertification in this school asbestos property damage class action and the Third Circuit's mandamus denial. These petitioners previously had full interlocutory review under 28 U.S.C. § 1292(b) of the initial class certification ruling.[5] After denial of their subsequent motion for class decertification,[6] petitioners sought a second immediate review of the class status of this action through a writ of mandamus, without ever having requested certification for interlocutory review under § 1292(b). After hearing below, the mandamus petition was dismissed by the court of appeals.[7] W.R. Grace petitioners have offered no reason why this class ruling is special or important for this Court to review by certiorari, nor have they demonstrated any circumstances why they are clearly and indisputably entitled to invoke this extraordinary relief. This petition for certiorari is facially without merit both in fact and in law.

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3. *In re School Asbestos Litigation*, 921 F.2d 1310, 1330, 1338 (3d Cir. 1990); 5 cases; U.S. Gypsum App. at 1a, 45a and Grace App. at 1a, respectively.

4. This case exemplifies the beneficial use of class actions in asbestos litigation as recommended in the REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION TO THE CHIEF JUSTICE OF THE UNITED STATES (Mar. 12, 1991).

5. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986); 2 cases.

6. *In re Asbestos School Litigation*, Master File No. 83-0268, Pretrial Order No. 203 (E.D. Pa. Jan. 12, 1990); Grace App. at 17a.

7. *In re School Asbestos Litigation*, 921 F.2d 1338 (3d Cir. 1990); Grace App. at 3a.

U.S. Gypsum petitioners, **No. 90-1378**, seek a writ of certiorari on the grounds (1) that the district court allegedly lacks jurisdiction to hear this class action because when first certified, some of the 35,000 absent members, not now identifiable, did not and might not be able to allege the jurisdictional amount requirement, and (2) that there is an alleged novel issue presented regarding diversity of citizenship jurisdiction in a class action. Petitioners' mandamus writ was denied by the court of appeals.[8]

All prerequisites of class action Civil Rule 23(a) have been satisfied here, including the numerosity test. It never has been disputed that the district court has diversity jurisdiction to hear the claims of the named plaintiffs and of a sufficiently large number of the absent-class-member school districts within its jurisdiction[9] to permit the class action to be maintained. Moreover, as a result of the district court's December 17, 1990 order[10] (four days after the court of appeals' decisions) which limited the class, the class now includes "[o]nly those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building material"[11] (which, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure, or which otherwise is easily damaged), and who have damages over $10,000.[12] Defendants have not con-

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8. *In re School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990); U.S. Gypsum App. at 1a.

9. *I.e.*, those schools who have alleged in the Amended Complaint claims for damages in excess of $10,000 arising from friable asbestos-containing products in their school buildings.

10. *In re Asbestos School Litigation*, Master File No. 83-0268, Pretrial Order No. 273 and Memorandum (E.D. Pa. Dec. 17, 1990), 1990 WL 236116 (App. 1a).

11. *In re Asbestos School Litigation*, Master File No. 83-0268, Memorandum accompanying Pretrial Order No. 273 at 1 (E.D. Pa. Dec. 17, 1990) (App. A-2).

12. Allegations in the Amended Complaint in force before December 17, 1990 stated that the class consisted of, among others, members whose buildings have or had friable asbestos-containing materials and who incurred damages more than $10,000. U.S. Gypsum App. at 82a, 91a. The Amended Complaint also noted that some small number of members may have damages less than $10,000. *Id.* Therefore, on December 17, 1990, the district court

tested the good faith allegation that each class member with friable asbestos in a school building who seeks compensatory and punitive damages has a claim exceeding $10,000. Thus, this part of the jurisdictional allegation was also not a contested issue before the court of appeals.

Moreover, it is undisputed that from the outset, there has been complete diversity of citizenship between all named class representatives and all defendants from each of the three consolidated complaints. There are, concededly, absent class members who are not diverse from defendants. This does not raise, however, a novel issue before the Court. It was decided many years ago by this Court that diversity of the named parties only is sufficient in representative suits, and this recently has been reaffirmed by Congress.

Kaiser Cement, **No. 90-1367**, challenges the Third Circuit's affirmance of the district court's final approval under Rule 54(b) of a partial class settlement with a codefendant. Not only does Kaiser Cement, a nonsettling defendant, lack standing to object to the settlement, but it has not shown any immediate prejudice from the settlement order, and it acknowledges that a term of the settlement was designed to protect nonsettling defendants' contribution and indemnity rights. The only alleged prejudice raised by Kaiser Cement involves a speculative and hypothetical possibility that a class member might challenge the settlement in a future proceeding in a different court. However, if that occurred and if the challenge were successful, the settlement necessarily would be voided as to that class member and consequently, nonsettling defendants, including Kaiser Cement, would be free to seek contribution and indemnity in that proceeding by way of a third party complaint against the settling defendant. In any event, jurisdictional amount issues are now moot.

NOTES *Continued*:
effectively eliminated from the class those members with damages less than $10,000.

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S REFUSAL TO GRANT MANDAMUS ON THE TRIAL COURT'S DISCRETIONARY RULING DENYING CLASS DECERTIFICATION.

Both of the Questions Presented by the W.R. Grace petitioners go to the decision of the Third Circuit that this was not an appropriate case for mandamus review of the denial of their class decertification motion. But only recently this Court has said once again that "the granting of an extraordinary writ is, in itself, extraordinary. [*In re McDonald*,] 489 U.S., at 184-185, 109 S.Ct., at 996; see *Kerr v. United States District Court*, 426 U.S. 394, 402-403, 96 S. Ct. 2119, 2123-2124, 48 L.Ed.2d 725 (1976)." *In re Sindram*, 111 S. Ct. 596, 597 (1991). Particular litigation hardships that might be suffered as a result of a discretionary, conditional, interlocutory order are not sufficient grounds for granting mandamus. "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Mandamus will not lie to correct a trial judge's exercise of discretion. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

Contrary to what petitioners contend, the Third Circuit did not adopt a rigid rule against mandamus in reviewing a class status ruling. It simply followed the established rule that mandamus hardly ever is appropriate to review such a ruling, reaffirming what it previously held in *DeMasi v. Weiss*, 669 F.2d 114 (3d Cir. 1982). As Judge Aldisert wrote:

> We do not write on a clean slate here. . . . In *DeMasi*, we held clearly that "a class action determination, affirmative or negative, is not a final order appealable under 28 U.S.C. § 1291." 669 F.2d at 119, that the only route open "for interlocutory review of the grant or denial of class certification, **at least in this case**, is pursuant to 28 U.S.C. § 1292(b)," *id.*, and that "[w]e will not employ mandamus in this case to circumvent these precepts." *Id.* **There are no circumstances in the matter before us now that were not present in** *DeMasi*.

(Grace App. at 9a) (citations omitted, emphasis added).

Petitioners overlook the fact that in the passage Judge Aldisert quoted from *DeMasi*, the court there spoke of "at least in this case" and again said "in this case." After that quotation Judge Aldisert said that there were "no circumstances in the matter before us" to require a different result. Words could hardly make it clearer that the court below was making a sensitive appraisal of particular cases and not, as petitioners would have it, announcing a categorical imperative.

In *DeMasi*, as here, petitioners never sought interlocutory review of the discretionary, conditional class ruling under 28 U.S.C. § 1292(b), which would have been an adequate alternative means for interlocutory review, and petitioners still had and have adequate means to review that ruling after final judgment. Petitioners' suggestion that as a practical matter there was no opportunity for effective interlocutory appellate review is belied by their admission that they were successful at an earlier stage before this same trial court in obtaining a Section 1292(b) certificate and the Third Circuit did review the class certification, affirming in part and reversing in part. (Grace Petition at 4, *citing, In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852, 915 (1986)(2 cases)). Having had one full opportunity for interlocutory review, petitioners are now seeking in the eighth year of this litigation to disrupt the district court proceedings for a second time by rearguing the same issues before the Third Circuit.

Under these circumstances, the Third Circuit understandedly denied petitioners' attempt to circumvent well-settled principles governing the use of this extraordinary and drastic mandamus relief. No other circuits are in conflict with these familiar precepts. It is not coincidence that almost all of the purported conflicting cases cited by petitioners were decided in 1974-1977, before this Court clarified the rules about mandamus in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) and *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).[13] Nor

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13. In addition, these cases were decided before 1978 when this Court greatly cut back on immediate review of class certification decisions. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-470 (1978) (rejecting "death knell"

are any of the more recent cases cited by petitioners in conflict with the decision below, and, in any event, each is manifestly distinguishable from this case, which involves a petition for mandamus review of a trial court's provisional, discretionary order denying decertification in a Rule 23(b)(3) opt-out class action.[14]

Nor are the W.R. Grace petitioners any better off when they assert that it was an abuse of discretion for the Third Circuit not to grant them the writ they sought. The power to issue mandamus exists only when the litigant's right to the writ is "clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). It cannot be an abuse of discretion not to issue the writ to reverse an order denying class decertification when other adequate alternative means existed and exist for petitioners to obtain the relief they seek. It is conceded that the district court acted within its jurisdiction in denying class decertification. It is conceded that petitioners never sought certification under Section 1292(b) of the order challenged here. It is conceded that petitioners had had full interlocutory review by the Third Circuit of the 1984 class certification order, following which certiorari was denied by this Court.

In addition to all this, review at this stage of the denial of decertification of the class would be wastefully premature. Under Civil Rule 23(c)(1) a class ruling "may be 'altered or amended before the decision on the merits.' Thus, a district

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and "collateral order" theories of review). *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (rejecting "appeal under 28 U.S.C. §1292(a)(1). "If there is to be immediate review of a class certification ruling, it must be by allowance of an interlocutory appeal under 28 U.S.C. §1292(b)." C. Wright, FEDERAL COURTS §101 at 704 (4th ed. 1983), *citing Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 n. 9 (1980).

14. Three of these decisions dealt with certification of a mandatory no opt-out class for damages, two of them in a class settlement context. *In re Temple*, 851 F.2d 1269 (11th Cir. 1988) (mandatory limited fund class certified without record support, together with an injunction against all pending actions); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987) (mandatory settlement class for damages); *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984) (mandatory settlement class for damages). Also distinguishable is *In re Fidelcourd Corp.*, 893 F.2d 706 (5th Cir. 1990) (mandamus review of a class trial plan).

court's order denying or granting class status is inherently tentative." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 11 (1978). "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). This fact was explicitly recognized by the Third Circuit in 1986 when it upheld the initial certification of the class. "We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper." 789 F.2d at 1011. If the trial court should ever find that this litigation cannot be managed, it has full power to decertify the class. Surely an appellate court should not interfere by extraordinary writ when, as in this case, experience thus far has shown that use of the class action was a wise and productive decision.[15]

II. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE NOW MOOTED ISSUE OF THE AMOUNT-IN-CONTROVERSY REQUIREMENT WHEN THE DISTRICT COURT USED DISCRETION TO DEFER DISMISSING SOME CLASS MEMBERS.

The U.S. Gypsum petitioners, in their Question 1, and Kaiser Cement, in its Question 1.a., challenge the decision of the district court to defer dismissing from the class those members whose claims do not reach the applicable $10,000 requirement for amount in controversy.[16] Of course it is true

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15. The extensive discussion by the W.R. Grace petitioners (Grace Petition at 6-18, 15-19) of the problems they think will arise from Pretrial Order No. 233 governing trial structure is also premature, and is not properly before this Court. That Order was entered on May 17, 1990 (Grace Petition at 1-2, 21a). The writ of mandamus that was sought from the Third Circuit was directed to the denial of decertification in Pretrial Order No. 201, entered on January 12, 1990 (Grace App. at 17a). The May 17th order was not before the Third Circuit on the mandamus petitions and would not be before this Court if certiorari were to be granted.

16. The issue arose from plaintiffs' unrebutted pseudonymal allegation that "the plaintiff and all members of the class, except a minimal portion thereof,

that every member of the class must satisfy the amount requirement of the statute. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But there are three independent reasons why the action of the trial court is wholly consistent with *Zahn* and why this is not an issue worthy of this Court's attention.

First, the trial court was acting pursuant to the specific authority conferred by Civil Rule 12(d). That rule says that a motion challenging subject-matter jurisdiction is to be heard before trial "unless the court orders that the hearing and determination thereof be deferred until the trial." The district court did exactly what the rule allows it to do. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). Mandamus surely cannot issue to challenge a district court's exercise of discretion explicitly given to it by rules promulgated by this Court.[17]

Second, these petitioners forget — or deliberately ignore — that the district court undoubtedly had and has jurisdiction of the action. The question is at most whether certain unnamed members of the class are to be excluded from the class now or at a later time. The lower court is not proceeding "as a court of general, rather than limited, jurisdiction." U.S. Gypsum Petition at 20. It is going forward to decide a case of which it surely has jurisdiction. At a later time it will determine whether all of the school districts described as members of the class are bound by the judgment. The U.S. Gypsum petitioners say (p. 20) that the ruling below means that "[a] plaintiff need no longer use a key to open the federal courthouse door, because the door is already open; the district court can now *presume* it has the

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have claims in excess of $10,000. . . . Existing and even identified may exist which could separately support small school systems in which no feasible or potentially feasible asbestos-containing material exists and for whom punitive damages may not be recoverable when counsel allege $10,000 in controversy." Amended Complaint in *School District of Lancaster v. Lake Asbestos of Quebec*, No. 83-0298 E.D. Pa., 91 U.S. Gypsum App. at 82a, 91a.

17. The U.S. Gypsum petitioners claim they are entitled to an immediate discovery under Civil Rule 12(b)(5), but Rule 12(b) indicates only when particular kinds of objections must be raised to avoid waiver. Rule 12(d) prescribes when motions are to be determined.

authority to resolve claims until proof to the contrary is presented." They are right that "the door is already open", but it is open because there are named plaintiffs with claims for more than $10,000 and citizenship diverse to that of defendants. The question is how many school districts can be allowed to go through the open door, and that turns on facts about individual districts that would be burdensome and unnecessary to decide at the present stage.

Third, any issue about amount in controversy is now out of the case. On December 17, 1990, four days after the decisions from the Third Circuit that are now being challenged before this Court, the district court amended the class definition to include "[o]nly those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building materials" and thus "only those school districts that can in good faith assert claims in excess of $10,000." Pretrial Order No. 273 and accompanying Memorandum at 1. (App. A-2). The class has now been limited in just the fashion that petitioners are urging, and their contentions in this regard are moot.

III. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW LONGSTANDING JURISPRUDENCE OF THE APPLICATION OF THE COMPLETE-DIVERSITY RULE IN REPRESENTATIVE ACTIONS.

Kaiser Cement, in its Question 1(b), and the W.R. Grace petitioners, in their Question 2, question whether the statutory requirement of diversity has been properly applied in this case. Indeed it has - but the question in any event would not merit the attention of this Court.

It is literally hornbook law that in a class action based on diversity of citizenship only the named parties need be considered in determining diversity. "It has long been the rule that in a class action only the citizenship of the named representatives is to be considered, and that it is no objection to jurisdiction that other members of the class, not named as parties, are of such citizenship as would defeat diversity." C. Wright, FEDERAL COURTS §72 at 484 (4th ed. 1983). The rule has its origin in the

well-known case of *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). In *Snyder v. Harris*, 394 U.S. 332 (1969), the Court held that there can be no aggregation of the claims of class members to meet the statutory requirement of amount in controversy, but it noted with regard to diversity that: "[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant * * *." 394 U.S. at 340.

Petitioners assert that *Finley v. United States*, 490 U.S. 545 (1989), has changed this rule. Their interpretation of Finley is wrong. The fact is that there is not even a dictum, much less a holding, in *Finley* about class actions. It may be for that reason that the petitioners seek to put this into a larger context. The U.S. Gypsum petitioners say that "whether 'limited' diversity is sufficient in class actions has never been resolved by the Court" and that it ought to "address this important issue." (p. 29). Kaiser sees "ambiguity" (p. 25) about that question, but Kaiser paints a poignant picture of Congress caught up in "a 'judicial reform' tug of war" (p. 16) and argues that this case should be used "to provide guidance to the Congress as the ultimate arbiter of the extent to which federal courts should be statutorily empowered to hear state law claims." (p. 13; see *also* p. 17).

What all this pretty rhetoric ignores is that Congress has spoken to the problem. The Judicial Improvements Act of 1990 gives a clear answer. The purpose of that Act was "to implement several of the more noncontroversial recommendations of the Federal Courts Study Committee." H.R. Rep. No. 734 at 15, 101st Cong., 2d Sess. (1990), *reprinted in* 1991 U.S. Code Cong. & Ad. News, 6860, 6861. That Committee, feeling that "[r]ecent decisions of the Supreme Court raise doubts about the scope of pendent party and ancillary jurisdiction under existing federal statutes," REPORT OF FEDERAL COURTS STUDY COMMITTEE 47-48 (1990), recommended that "Congress should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base." *Id.* at 47. As a distinguished member of the Study Committee,

former Solicitor General Rex Lee, said bluntly, this was intended "to overrule the restrictions on supplemental jurisdiction created by *Finley*." Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 333.[18] Congress responded by adopting 28 U.S.C. § 1367, Act of Dec. 1, 1990, Pub. L. 101-650, § 310, 104 Stat. 5089. Under subsection (a) of § 1367, district courts now have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Subsection (b) then limits supplemental jurisdiction with regard to some uses of Rules 14, 19, 20 and 24. Subsection (b) does not limit supplemental jurisdiction over counterclaims and cross-claims under Rule 13, impleader of a third party under Rule 14 (as opposed to the assertion by plaintiff of a claim against a third party who has been brought in under Rule 14), or, most significantly, class actions under Rule 23. The new statute was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 734, 101st Cong., 2d Sess. at 29 (1990).

It cannot be doubted that prior to *Finley* it was understood that diversity is required only between the named representatives of the class and the opponents of the class. The House Judiciary Committee's citation of *Ben Hur* and *Zahn* (as Kaiser seems to recognize, p. 16 n.9) makes that clear, if indeed there could have been any doubt. Congress has undoubted power to adopt those rules. The requirement of complete diversity is a statutory requirement, not a constitutional one, and Congress may give the district courts jurisdiction over cases in which there is only minimal diversity. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-531 (1967). The rule for diversity jurisdiction in class actions is a subset of the established rule governing all representative actions. *See generally*, 13B C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND

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18. Indeed U.S.C. (sum recognizes this, even if rather grudgingly (p. 24, n.23).

PROCEDURE 2d §3606 at 424-25 (1984). The law prior to *Finley* was that only the citizenship of the named parties mattered.[19] The law in all actions commenced on or after December 1, 1990, is that only the citizenship of the named parties matters and that if the court has diversity jurisdiction with regard to them, it can hear claims of other parties that are part of the same case or controversy within the meaning of Article III. Surely this Court has more important things to do than deciding whether to extend *Finley* far beyond its specific holding to exclude from federal court claims by unnamed nondiverse parties in suits brought prior to December 1, 1990, especially when Congress has made it explicit that it wants the courts to hear such claims and it wants to restore the law as it was known before *Finley*.

IV. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE APPROVAL OF THE LAQ CLASS SETTLEMENT BEING CHALLENGED BY NONSETTLING PETITIONER-CODEFENDANT WITHOUT STANDING.

The universal rule is that nonsettling defendants in multiparty actions do not have standing to object to a settlement with a codefendant except in narrow, constrained circumstances, *i.e.*, when defendants can demonstrate some prejudice through "a present or immediate injury in fact." *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Moreover, there must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type "likely to be redressed by a favorable decision." *Id.*; *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 472 (1982). Kaiser Cement does

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19. Shortly before the 1990 Act, Congress similarly validated and did not change the generally-accepted principle that the citizenship of the representative controls in representative suits including class actions brought under the diversity statute. Congress amended 28 U.S.C. § 1332 in 1988 to create a specific exception under § 1332(c)(2) for the representative of an estate or of an infant or incompetent in order to eliminate the device of manufacturing diversity by appointing a representative from another jurisdiction. 14 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE §3640, 3641 (Supp. 1991).

not even attempt to assert any present or immediate injury to it from the Lac d'Amiante du Quebec Ltee ("LAQ") settlement, in contrast to the petitioner in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), who had standing because "it would be obviously, and immediately injured if th[e] class-action judgment against it became final without binding the plaintiff class." *Id.* at 805. Phillips Petroleum Co. was the actual defendant in the action so it was vitally interested in how many plaintiffs were suing it directly. Kaiser's potential interest in the LAQ settlement is the protection of its contribution rights. Kaiser Cement acknowledges, however, that the settlement was purportedly designed to protect nonsettling defendants' contribution and indemnity rights, and the Third Circuit so found.

The only prejudice alleged by Kaiser Cement is the speculative and hypothetical possibility that a class member will challenge the settlement in a future proceeding, and as a result, Kaiser Cement's contribution and indemnity rights against LAQ may be diminished. However, it is axiomatic that the future *res judicata* effect of any judgment can only be determined by a later court. C. Wright, FEDERAL COURTS §72 at 483 (4th ed. 1983); RESTATEMENT SECOND OF JUDGMENTS §42 (1982). Moreover, even if such a future challenge were successful due to some defect in the settlement, then LAQ would not be protected by it,[20] and Kaiser Cement would be free to implead any third-party defendant, including LAQ, to test its contribution or indemnity rights in that collateral action.

It is the nature of a class action that frequently you cannot know exactly who is in the class until the claimants come in. Here, settling parties were fully aware of and contemplated at the time of the settlement (before the class definition was amended) the possibility that some class members (those from small school systems without friable asbestos and potentially no claim for punitive damages under state law) might be unable to

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20. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 834 (3d Cir. 1973) (After finding that publication of notice of securities fraud class actions in two newspapers on two separate occasions was fatally insufficient, the court held that "all subsequent proceedings pertaining to the settlement are devoid of validity and all settlement orders issued pursuant to these proceedings will therefore be vacated.").

assert claims in excess of $10,000. All parties accepted that if such absent class members existed outside the court's jurisdiction, they would not be bound by the settlement with LAQ.[21] Thus, LAQ, and not Kaiser Cement, is the only party prejudiced under this scenario, and the only party with standing to complain.

Finally, Kaiser Cement challenges jurisdiction of the certified national class based on local action principles. Kaiser's local action argument is not a proper subject for review on a petition for writ of certiorari seeking review of a partial class settlement and there is no conflict among the courts of appeals. The claims are transitory claims that could have arisen and did arise anywhere, and everywhere. *Dayton Independent School District v. U.S. Mineral Products Co.*, C.A. No. B-87-003307-CA, slip op. at 10 (E.D. Tx. Feb. 14, 1989).

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

Herbert B. Newberg*
Harvey S. Kronfeld
Sandra L. Duggan
Roger P. Cameron
HERBERT B. NEWBERG, ESQ., P.C.
530 Centre Center
601 Walnut Street
Philadelphia, PA 19106
(215) 922-4740

David Berger*
Harold Berger
Warren D. Mullen
Thomas F. Hughes
Howard E. Langer
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Co-Lead Counsel for Respondents - Class Plaintiffs
*Counsel Of Record

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21 LAQ stated in briefing before each of the courts below that it entered the settlement fully aware that it would not bind class members who are ultimately found to be outside of the trial court's jurisdiction, and that such class members could be free to seek individual relief. (App. A-7, A-10).

Of Counsel:

Charles Alan Wright, Esquire
727 E. 26th Street
Austin, TX 78705

Arthur R. Miller, Esquire
1545 Massachusetts Avenue
Cambridge, MA 02138

Arnold Levin, Esquire
Laurence S. Berman, Esquire
Levin, Fishbein, Sedran & Berman
320 Walnut Street, Suite 600
Philadelphia, PA 19106

Chair, Trial and Liability Committee for Respondents - Class Plaintiffs

Stanley J. Levy, Esquire
Levy Phillips & Konigsberg
90 Park Avenue, 31st Floor
New York, NY 10016

W. Robert Morgan, Sr., Esquire
Morgan Law Offices
1651 North First Street
San Jose, CA 95112

Alvin B. Lewis, Jr., Esquire
Hartman, Underhill & Brubaker
221 East Chestnut Street
Lancaster, PA 17602

Ellen Chapnick, Esquire
Wolf Popper Ross Wolf & Jones
845 Third Avenue
New York, NY 10022

Daniel A. Speights, Esquire
Speights & Runyan
304 Lee Avenue
P.O. Box 685
Hampton, SC 29924

Edward J. Westbrook, Esquire
Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street, Suite 600
Charleston, SC 29402

E. Robert Wright, Esquire
Thomas, Snell, Jamison,
Russell, Williamson & Asperger
2445 Capital St., P.O. Box 1461
Fresno, CA 93716

Frank J. Daily, Esquire
Quarles & Brady
411 E. Wisconsin Avenue
Milwaukee, WI 53202-4497

Zell Davis, Jr., Esquire
McGee Jordan Shuey Gordon
Morris & Doner, P.A.
2328 10th Ave. North, Ste 300
Lake Worth, FL 33461

Ernest G. Kelly, Jr., Esquire
Evans, Petree, Cobb & Edwards
81 Monroe Avenue, Ste. 600
Memphis, TN 38103

Robert E. Sweeney, Esquire
1500 Illuminating Building
55 Public Square
Cleveland, OH 44113

Martin Greitzer, Esquire
Greitzer & Locks
1500 Walnut St., 21st Floor
Philadelphia, PA 19102

Respondents-Class Plaintiffs' Executive Committee

Dated: March 29, 1991

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION	:	MASTER FILE NO. 83-0268
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

Pretrial Order No. 273

[Filed December 17, 1990]

AND NOW, this 13th day of December, 1990, in consideration of the Plaintiffs' motion to amend the class definition, set forth in Pretrial Order No. 20, and the Defendants' responses thereto, it is ORDERED that the motion is granted and that the class definition is amended as proposed by the Plaintiffs. Only those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building material will remain members of the Plaintiff Class.

BY THE COURT:

/s/ James McGirr Kelly

JAMES McGIRR KELLY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION	:	MASTER FILE NO. 83-0268
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

MEMORANDUM AND ORDER

[Filed December 17, 1990]

J. M. KELLY, J. **December 13, 1990**

Plaintiffs have moved this court to amend the class definition in these consolidated diversity actions. By Pretrial Order No. 20 (August 28, 1984) this court certified the Plaintiff Class as being comprised of all owners and operators of elementary and secondary schools in the United States. It appears that after several years of investigation and discovery the Plaintiffs have concluded that it would be appropriate to amend the class definition so as to include only those school systems that contain "friable" asbestos products, and thus only those school systems that can in good faith assert claims in excess of $10,000. Several defendants are in opposition to the proposed amendment of Pretrial Order No. 20, while one defendant, National Gypsum Company, supports the proposed amendment to the class definition. For reasons stated more fully below, this court will grant Plaintiffs' motion to amend the class definition.

Federal Rule of Civil Procedure 23(c)(1) provides, in reference to determinations that a case is maintainable as a class action, that "[a] determination once made can be altered or amended before a decision on the merits if, upon fuller development of the facts, the original determination appears unsound." In the extreme, this section of the rule permits a court to decertify a class and retract its approval of a litigation being brought as a class action. See *Valentino v. United States Postal Service*, 674 F.2d 56, n. 12 (D.C. Cir. 1982).

In more moderate circumstances, however, a court may merely alter or amend the class certification in keeping with its responsibility to reevaluate continually a case's class status as the case progresses. *See, e.g., Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948-9 (9th Cir. 1979). The Second Circuit enunciated a similar responsibility in *Lamphere v. Brown University*, 553 F.2d 714, 720 (2d Cir. 1977), emphasizing "the need for the district court to follow closely the developing evidence as to class-wide decision making and to take seriously its power under Rule 23(c)(1) to alter or amend its certification order before the decision on the merits."

At the time this litigation was initiated, the types and amounts of asbestos products, if any, that were contained in the thousands of school buildings were unknown. The class was properly certified thereafter as inclusive of all elementary and secondary school systems. More than seven years later, the Plaintiffs have not distinctly identified asbestos containment on a building-by-building basis. However, the Complaint has been amended to focus on the presence of *friable* asbestos as the basis for Plaintiffs' claims. Congress has also recently passed legislation specifying that school districts must inspect for any asbestos and initiate maintenance with respect to friable asbestos-containing materials located in their buildings. Asbestos Hazard Emergency Response Act of 1986 ("AHERA").

In light of these developments, the Plaintiffs' proposed amendment to the class definition, narrowing class membership to include only those school districts whose buildings contain friable asbestos products, appears proper. "Friable" asbestos has been defined as material, "which, when dry may be crumbled, pulverized, reduced to powder by hand pressure, or which otherwise is easily damaged." *See, e.g.*, Third Amended Complaint. That it is *friable* asbestos containment for which this class action is seeking relief is consistent with Congress's determination that *friable* asbestos is the type for which school [sic] must implement maintenance plans. Adjusting the class definition correspondingly will streamline this litigation, ensuring that critical issues will be common to all class members.

The defendants who are in opposition to the proposed amendment assert three main arguments. Defendants first claim

that it would be improper for this court to amend the class definition while diversity jurisdiction issues are pending before the Third Circuit. However, the fact that the Third Circuit is currently considering related jurisdictional issues does not prevent this court from properly managing the class. The Plaintiffs have suggested that the class definition be amended in order that only members with claims in excess of the required jurisdictional amount ($10,000) remain in the class. As that is required under *Zahn v. International Paper Co.*, 414 U.S. 291 (1983) [sic], it is not improper to consider the proposed amendment.

Second, the defendants in opposition assert that many class plaintiffs who have relied on the litigation will be unfairly excluded by the amendment without notice. The situations in which notice to absent class members is required under Rule 23 are limited. Notice is required when the court certifies a class under Rule 23(b)(3) because of common issues of law or fact that predominate over other aspects of the suit and render a class action the appropriate vehicle to resolve claims. Fed.R.Civ.P. 23(c)(2). Notice is also required when a class action is to be dismissed or compromised. Fed.R.Civ.P. 23(e). In instances such as here, where an amendment to the class definition has been proposed, notice is not required but discretionary notification is encouraged where the plaintiff has shown that excluded class members: (1) received notice of their original inclusion in the class; (2) relied on the class suit to protect their interests; and (3) would be prejudiced as a practical matter by their exclusion. *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989).

Plaintiffs' amendment will undoubtedly trim the class by excluding school districts whose buildings do not contain friable asbestos; however, those parties will not be unduly prejudiced as a result. As stated above it is the containment of *friable* asbestos for which Congress has required maintenance plans be implemented, and for which Plaintiffs have amended their Complaint to address. In light of these developments, it is no longer appropriate for any and every school district to remain a class member. It has become clear that *friable* asbestos is the focus of Plaintiffs' claim for relief. Any claims made by school districts not containing friable asbestos in their buildings are distinct and arguably would be prejudiced if forced to remain

and be tried side by side with friable asbestos claims. Notice to excluded class members of the redefinition of the class is not required under these circumstances.

The defendants' third basis for opposition to the proposed amendment centers around the meaning of the term "friable", suggesting that issues of vagueness and timing regarding friable asbestos mandate the rejection of Plaintiffs' proposed class redefinition. However, any questions needing to be resolved regarding the presence of friable asbestos products and the concomitant effects their resolution would have on class membership are no *more* problematic than those that occur in most class litigation. Although, as defendants state, the class definition must be reasonably specific, by nature the definition of a class and the subsequent determination of its membership require some inquiry and investigation as to the individual class members to ensure the propriety of their inclusion.

In *Crosby v. Social Security Administration of the United States*, 796 F.2d 576 (1st Cir. 1986), cited by the defendants, the class definition was rejected because it necessitated the determination of a subjective issue - what as a "reasonable time" within which a hearing should have been granted - for each individual potential class member. That is not this case. Here, under the proposed amendment, an *objective* determination - the existence of friable asbestos products in school buildings - will be used to determine membership in the class. This is not beyond the bounds of reasonable specificity for purposes of defining the class.

The issue of timing raised by the defendants does not prevent the proposed amendment to the class definition. All of the Plaintiffs' buildings were completely constructed prior to the initiation of this action. Thus the issue for purposes of determining membership in the class is simply whether or not the Plaintiffs' schools were constructed using asbestos materials that are friable, the term friable being defined as "*which, when dry*, may be crumbled, pulverized, reduced to powder by hand pressure, or which otherwise is easily damaged." *supra*, p. 3 (emphasis added). This does not require a determination of *when* each product becomes, or became friable. All that is necessary is for Plaintiffs to identify the school districts that

contain friable asbestos materials. All such school districts shall remain class plaintiffs under the amended class definition.

An appropriate order follows.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 90-1247
NO. 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

School District of Lancaster, et al.,

Plaintiffs

v.

Lake Asbestos of Quebec, Ltd., et al.,

Defendants.

United States Gypsum Company
and
Kaiser Cement Corporation,

Appellants.

Appeal From Final Judgment Of
The United States District Court For The
Eastern District of Pennsylvania.
Master File No. 83-0268

BRIEF OF APPELLEE
LAC d'AMIANTE du QUEBEC, LTEE

Edward W. Madeira, Jr.
Richard W. Foltz, Jr.
Matthew H. Adler
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103

Frederick B. Lacey
Jay G. Safer
Molly S. Boast
LeBOEUF, LAMB, LEIBY
& MacRAE
520 Madison Avenue
New York, New York 10022

Attorneys for Appellee
Lac d'Amiante du Quebec, Ltee

SUMMARY OF ARGUMENT

After more than six years of litigation, LAQ entered into an agreement to settle this certified nationwide class action for one million dollars. LAQ, a peripheral defendant in asbestos property damage litigation, was fully aware of the then-pending attacks on the District Court's subject matter jurisdiction when it entered into the settlement agreement; indeed, the agreement expressly acknowledged that the settlement would be voided if there were no subject matter jurisdiction.

* * *

Appellants, as part of their overall strategy to derail this litigation, objected to preliminary and final approval of the settlement before the District Court, on the ground that the District Court lacked subject matter jurisdiction to approve the settlement. They appeal here on the same ground, arguing that a partial settlement cannot become final in a diversity class action unless the damage claims of each absent class member are determined first. These objections are an attack on use of the class action device when a court's diversity jurisdiction is invoked, not an attack on the LAQ settlement itself. Appellants' speculation that some few class members exist over whose claims the District Court lacks jurisdiction does not give them standing to challenge final approval of the LAQ settlement. The settlement does not bind class members whose claims are less than $10,000, and it does not purport to do so. LAQ alone bears the risk of any uncertainty that certain claims may not be barred by the settlement. It has accepted the risk, and no one else should be heard to complain on its behalf.

* * *

ARGUMENT

* * *

C. These Appeals Should Be Dismissed Because Appellants' Claim of Legal Prejudice Procedure Is Wrong Both As A Matter of Fact And As A Matter Of Law.

* * *

. . . At this point, only LAQ bears the risk of not knowing the precise scope of the *res judicata* effect it obtained through its settlement, and LAQ has knowingly assumed that risk. The only

purpose served by these present appeals is the disruption of a settlement approval process that should only involve the District Court and the parties to the settlement.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: SCHOOL ASBESTOS
LITIGATION

MASTER FILE
NO. 83-0268

THIS DOCUMENT RELATES TO:
ALL ACTIONS

LAC D'AMIANTE DU QUEBEC, LTEE'S MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF THE SETTLEMENT BETWEEN LAQ AND THE PLAINTIFF CLASS

THE OBJECTIONS FILED BY NON-SETTLING DEFENDANTS PRESENT NO VALID REASON FOR WITHHOLDING FINAL APPROVAL OF THE SETTLEMENT

Two non-settling defendants have also filed objections to final approval of the settlement. United States Gypsum Company ("USG") and Kaiser Cement Company ("Kaiser") have taken this opportunity to restate their twice-rejected challenge to this Court's subject matter jurisdiction. These defendants have no standing to repeat their jurisdictional arguments in this context.

Defendants assert that they have "a real stake in ensuring that their rights under the judgment reduction provision are recognized and that . . . class members will be bound by this obligation." Kaiser Objection at 2. This concern is unwarranted. The judgment reduction provisions of the settlement agreement are not applicable until a Class member obtains a judgment against a defendant. In order for a Class member to obtain a valid judgment in this action, the Court must have subject matter jurisdiction and the judgment reduction provision will

accordingly, be binding on that Class member. If the Court were to determine that it did not have subject matter jurisdiction over a Class member's claims, that Class member is not bound by the settlement agreement, but neither will any defendant be liable to that Class member in this litigation.* Thus, non-settling defendants lack standing to object to the settlement even on the limited basis they propose.

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*Moreover, Class members whose claims were not within the Court's subject matter jurisdiction would not be subject to any judgment reduction as a result of the LAQ settlement because they would not be entitled to participate in the settlement proceeds.

Supreme Court, U.S.
FILED
APR 2 1991
OFFICE OF THE CLERK

No. 90-1378

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES GYPSUM COMPANY, ET AL.,
Petitioners

v.

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,
And A Conditionally Certified Class,
Respondents

and

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent

IN RE ASBESTOS SCHOOL LITIGATION
D.C. Master File No. 83-0268

Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PFIZER INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRITS OF CERTIORARI

ARLIN M. ADAMS*
CHARLES R. BRUTON
ROLIN P. BISSELL
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2000

Attorneys for the *Amicus Curiae*, Pfizer Inc.

**Counsel of Record*

April 2, 1991

SMITH BROWARDS DUNLAP COMPANY, 2007 S. ALLEGHENY AVENUE, PHILADELPHIA, PA 19145 (215) 467-8700

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No. 90-1378

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES GYPSUM COMPANY, ET AL.,
Petitioners

v.

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,
And A Conditionally Certified Class,
Respondents

and

THE HONORABLE JAMES MCGIBR KELLY,
Nominal Respondent

IN RE ASBESTOS SCHOOL LITIGATION
D.C. Master File No. 83-0268

Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PFIZER INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRITS OF CERTIORARI

QUESTION PRESENTED

Whether the federal district and circuit courts may use the Federal Rules of Civil Procedure to expand diversity jurisdiction so as to retain jurisdiction over a national state law class action asserting property damage claims even though it is undisputed: (a) that there has been no allegation in the plain-

tiffs' complaints that any absent class member has a jurisdictionally sufficient amount in controversy; (b) that hundreds, perhaps thousands, of the members of the class cannot meet the "amount in controversy" requirement of 28 U.S.C. § 1332; and (c) that some undetermined number of absent class members are not diverse from the defendants from which they seek recovery.

SUMMARY OF THE ARGUMENT

The petition for certiorari is not a run-of-the-mill petition. The decisions below, because they substantially alter the fundamental requirements for diversity jurisdiction, and affect how and when federal jurisdiction is to be determined, have a pervasive and far reaching impact on the administration of justice nationwide that extends well beyond the boundaries of this particular litigation, important as it alone may be. The opinions of the lower courts represent a major expansion of federal court jurisdiction through the creation of a "national state law class action" exception to the limits on diversity jurisdiction. In addition, they radically alter the rule as to when the jurisdiction of a federal district court must be determined.

INTEREST OF THE AMICUS CURIAE

This brief, which urges the Court to grant writs of certiorari to review the issues raised by *United States Gypsum Co., et al., Petitioners, v. Barnwell School District No. 45, et al., Respondents*, 921 F.2d 1310 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3615 (U.S. March 4, 1991) (No. 90-1378), is submitted by Pfizer Inc.[1] Pfizer is a defendant in *In re Asbestos School Litigation*, D.C. Master File No. 83-0268 (E.D. Pa.), but was not a party to the proceedings in the Third Circuit on the issues raised in the petition for certiorari and addressed here.

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1. All parties have consented in writing to the filing of this brief, and the written consents have been filed with the Clerk of the Court.

Pfizer's immediate interest in the petition arises from the prospect of being required to defend a complicated, multi-phased jury trial that may take many months to complete against a class in which hundreds, perhaps thousands, of the absent class members are not properly before the district court. Defending the trial of this case would cause Pfizer, as well as the many other companies similarly situated, substantial and unwarranted expense.

ARGUMENT

The requirements for diversity jurisdiction are clear and, before the decisions by the district court and court of appeals, were well settled for decades: a plaintiff in a federal district court case must allege in good faith that his claim exceeds $10,000[2] and that he is a citizen of a state different from that of each defendant. 28 U.S.C. § 1332. *See Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But the courts below have circumvented these bright line limitations by distorting Rule 12(d) and Rule 23 of the Federal Rules of Civil Procedure to create a "national state law class action" exception to these clear limits on diversity jurisdiction. Federal courts are not free to do this through the Federal Rules of Civil Procedure or any other device.

The exact manner in which the lower courts' decisions have carved out these exceptions are extensively explained in the petition for certiorari, and will not be repeated here. However, the expansionary effect on federal jurisdiction of the lower courts' actions and the long-standing countervailing policies that these actions unilaterally override do merit review by this Court.

We shall address the critical issues dealing with the timeliness of determining jurisdiction, the amount in controversy distortion, and the complete diversity aberration, seriatim.

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2. During the pendency of this action the jurisdictional requirement was raised from $10,000 to $50,000. *See Pet. App.* at 11a.

I. The Lower Courts' Holdings Are a Radical Departure from 200 Years of Pleadings Practice Regarding the Time for Ascertaining the Jurisdiction of a District Court.

Until this case, a complaint filed in a United States district court was required to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." Fed. R. Civ. P. 8(a)(1). This is a logical and necessary requirement given that the federal courts are courts of limited jurisdiction.

Further, the orderly administration of justice, as well as the commands of this Court, require that jurisdiction be examined at the initial stage of a case. *See Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). That has always been the rule enunciated by this Court. *See e.g., Bingham v. Cabot*, 3 U.S. (3 Dall.) 382 (1798); *Turner v. President, Directors & Co. of Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799). And indeed, as is pointed out in Judge Cowen's dissent below, it was the rule applied by the Third Circuit as well—at least until this litigation. *Pet. App.* at 26a, *citing Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 905 F.2d 42, 45 (3d Cir. 1990) ("a federal court is bound to consider its own jurisdiction preliminary to consideration of the merits.")

The courts below departed from this age-old and commonsense rule through a fanciful reading of Rule 12(d) of the Federal Rules of Civil Procedure. But this stratagem serves no purpose other than to expand improperly the lower courts' jurisdiction. Under the guise of maintaining jurisdiction only provisionally until the jurisdictional issue can be resolved at some undefined point during or at the end of trial, the district court has, in fact, expanded its jurisdiction by presiding over a huge class of plaintiffs, issuing binding orders, dismissing parties, granting summary judgments, approving settlements, disbursing settlement funds to plaintiffs' counsel, and entering final judgments, all in a case where the plaintiffs have failed to make an allegation in their complaints suffi-

cient to invoke the district court's jurisdiction. *Pet. App.* at 23a-24a.

If, under this newly devised approach, jurisdictional questions can be delayed until the end of trial, then the federal courts will no longer be courts of limited jurisdiction. Indeed, carried to its logical conclusion, the district courts would be free to hear almost any state law case from start to finish. The only limitation would be that, should a district court decide at time of judgment that it never had jurisdiction, it would then have to declare the proceeding null and void and dismiss it as an expensive and regrettable error.

Rule 12(d) simply does not provide a basis for turning pleading practice on its head and subverting the mandate of 28 U.S.C. § 1332. Such a fundamental alteration must be the product of determinations by Congress or this Court, not the case specific concerns of lower courts.

II. The Lower Courts' Holdings Will, Unless Reversed, Eviscerate the "Amount in Controversy" Requirement.

In *Zahn*, this Court squarely held that "... any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims." 414 U.S. at 300. Despite this holding, the courts below have not even attempted to identify or dismiss plaintiffs who admit that they cannot allege, much less prove, that they have $10,000 in damages. Keeping many hundreds of school districts in a case where they cannot meet the most basic prerequisites of diversity jurisdiction is an unprecedented expansion of the federal courts' jurisdiction.

In essence, the lower courts' holdings create a new mechanism by which diversity plaintiffs may aggregate claims and evade the holding of *Zahn*. Again, it is clear that hundreds of the class members do not meet the "amount in controversy" requirement. *Pet. App.* at 23a-24a. Under this new jurisdictional scheme, as long as *some* members of the class can

allege the jurisdictional amount in controversy in good faith, any number of additional plaintiffs can join and remain in the suit, perhaps until a final judgment is entered.

But this Court has already stated emphatically that aggregation of claims is improper and that "one plaintiff may not ride in on another's coattails." *Zahn v. International Paper Co.*, 414 U.S. at 301. The lower courts' holdings are a departure from the mandates of this Court's prior opinions. Only this Court can review and reverse this departure and thereby prevent this clear expansion of diversity jurisdiction.

III. The Lower Courts' Holdings Create a "National State Law Class Action" Exception to the Complete Diversity Requirement of 28 U.S.C. § 1332.

The lower courts have also broken from the 200 year old requirement that there must be complete diversity between all plaintiffs and all defendants. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The Third Circuit declared that "only the citizenship of the named class representatives must be diverse from that of the defendants." *Pet. App.* at 15a. In essence, the Third Circuit has found in Federal Rule of Civil Procedure 23 an exception to the "complete diversity" requirement of 28 U.S.C. § 1332. Such an exception is a major expansion of federal jurisdiction, running counter to this Court's interpretation of 28 U.S.C. § 1332, *see Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978), and the historical trend toward limiting diversity jurisdiction.

At the time this suit was filed in 1983, each plaintiff seeking to gain access to federal court pursuant to diversity jurisdiction was required to allege that it had a claim in excess of $10,000. (Since then, diversity jurisdiction has been limited to plaintiffs who can allege $50,000 in damages.) As the increase of the "amount in controversy" requirement signals, and as even the Third Circuit acknowledges, there has been considerable debate concerning whether diversity jurisdiction should be maintained at all. *Pet. App.* at 18a-19a, *citing Judicial Improvements and Access to Justice Act*, Pub. L. No.

100-702, 102 Stat. 4642 (1988) (partly codified as amended at 28 U.S.C. § 1332); H.R. Rep. No. 100-889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 5987-88.

Despite this, the Third Circuit inexplicably has interpreted Congress' carefully crafted compromise, which narrowed diversity jurisdiction, as a green light for the district courts to expand diversity jurisdiction. Certainly, diversity jurisdiction should not be broadened through lower court manipulation of Rule 23. Indeed, it is clear that the Federal Rules of Civil Procedure can not expand the federal courts' jurisdiction; Rule 82 specifically so provides. *See Finley v. United States*, 490 U.S. 545 (1989) (*citing* Federal Rule of Civil Procedure 82). The present petition gives this Court a clear opportunity to stop the lower courts from misusing Rule 23 to expand diversity jurisdiction, and it should do so.

IV. The Supreme Court Should Decide These Critical Issues Now, Before the System Becomes Drastically Overloaded.

The major expansion of diversity jurisdiction brought about by the courts below is not something that should be left for future consideration. Nationwide diversity class actions threaten to clog the federal system with what are essentially state law claims. The scarce court resources that this very case has already consumed are staggering. Unless stopped by this Court, this trend will continue and increase.

Whether the federal courts are to become the custodians of these cases has become a question of national importance that will have enormous effects on the administration of justice. A denial of certiorari here will invite plaintiffs to pursue more state law claims in the federal courts, and will signal to the district courts that such filings are perfectly acceptable.

As this Court explained in *Snyder v. Harris*, 394 U.S. 332, 341 (1969), "... there is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already

overloaded federal court system." Similarly, there is no compelling reason for the lower courts to depart from the prior holdings of this Court in order to saddle an already overloaded federal system with state law products liability cases that have, historically, been adjudicated in the state courts.

In addition to the widespread effects of the holdings of the courts below, the present matter deserves the Court's review because of the nature of the changes the lower courts have created. The scope of diversity jurisdiction is the exclusive province of Congress and this Court. Changes in this area frequently are more important than interpretation of substantive law because jurisdictional questions go to the heart of the power of the district courts and the nature of our federal judicial system. As such, this Court should act now to review and resolve this urgent matter of national importance.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted,

Arlin M. Adams*
Charles R. Bruton
Rolin P. Bissell
Attorneys for the *Amicus Curiae*,
Pfizer Inc.

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103

*Counsel of Record

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No. 90-1367 (4)
(4) No. 90-1378

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,
Petitioner,

vs.

LAKE ASBESTOS OF QUEBEC, LTD., et al.,
Respondents.

UNITED STATES GYPSUM COMPANY, et al.,
Petitioners,

vs.

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE MEMPHIS
CITY SCHOOLS, And A Conditionally Certified Class,
Respondents,

—and—

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

FREDERICK B. LACEY
Counsel of Record
MOLLY S. BOAST
JOYCE HELLER
LEBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000
Attorneys for Respondent
Lac d'Amiante du Quebec, Ltee

QUESTION PRESENTED

Should this Court review a decision of the Court of Appeals for the Third Circuit affirming the district court's finding that non-settling defendants lack standing to challenge a partial settlement, where the decision below did not decide the questions presented by petitioners on subject matter jurisdiction and applied well-settled law to deny standing?

STATEMENT PURSUANT TO RULE 29.1

Respondent Lac d'Amiante du Quebec, Ltee is a wholly owned subsidiary of ASARCO Incorporated. Lac d'Amiante du Quebec, Ltee has no nonwholly owned subsidiary companies.

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No. 90-1367
No. 90-1378

IN THE
Supreme Court of the United States
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KAISER CEMENT CORPORATION,
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BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,
Respondents,

– and –

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Lac d'Amiante du Quebec, Ltee ("LAQ") respectfully requests that this Court deny petitioners' writs of certiorari that seek review of the opinion of the United States Court of

Appeals for the Third Circuit, *In re School Asbestos Litigation*, Nos. 90-1247 & 90-1248, reported at 921 F.2d 1330.[1]

OPINIONS BELOW

The LAQ settlement opinion is reported at 921 F.2d 1330, and is reprinted in petitioners' appendices at Kaiser Appendices to Petition No. 90-1367 ("Kaiser App.") 1a-20a and U.S. Gypsum Petitioners Appendices to Petition No. 90-1378 ("U.S. Gypsum Pet. App.") 45a-63a. The opinion of the district court has not been reported. It is reprinted in petitioners' appendices at Kaiser App. 21a-26a and U.S. Gypsum Pet. App. 119a-124a.

STATUTORY PROVISION INVOLVED

No statutory provisions were involved in the LAQ settlement opinion.

STATEMENT OF THE CASE

The only facts essential to the Court's determination whether to grant or deny these petitions for certiorari, which seek review of the judgment and opinion of the Court of Appeals for the Third Circuit on the standing of Kaiser and U.S. Gypsum to contest the partial settlement between LAQ and plaintiffs, are these:

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[1] There are two petitions for writs of certiorari to review the court of appeals' opinion which affirmed a partial final judgment of the district court dismissing with prejudice the claims against settled defendant LAQ ("LAQ settlement opinion"). One petition, filed only on behalf of Kaiser Cement Corporation ("Kaiser"), seeks review of the LAQ settlement opinion alone. The other petition, filed on behalf of U.S. Gypsum Company ("U.S. Gypsum"), Kaiser Gypsum Company, Inc. (a subsidiary of Kaiser, represented in this action by the same counsel of record), W.R. Grace & Co. and Fibreboard Corporation (collectively, "the U.S. Gypsum petitioners") seeks review of both the LAQ settlement opinion and another court of appeals' opinion, which denied consolidated petitions for writs of mandamus and prohibition based on petitioners' failure to show that the district court lacked subject matter jurisdiction under 28 U.S.C. §1332(a) ("subject matter jurisdiction opinion"). In this brief, LAQ responds only to petitioners' requests for review of the LAQ settlement opinion.

The action from which these petitions arise is a class action on behalf of elementary and secondary schools seeking damages for the presence of asbestos-containing construction materials in their buildings. LAQ and class plaintiffs executed an agreement settling plaintiffs' claims against LAQ on March 31, 1989. The agreement called for LAQ to pay $1,000,000 to the class. In exchange, class members agreed to dismiss their claims against LAQ with prejudice. The settlement agreement specifically provides that in the event any defendant were to obtain a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against such defendant would be reduced by any "amount, percentage or share of such judgment attributable to LAQ."[2]

Kaiser and U.S. Gypsum opposed the district court's preliminary approval of the settlement between LAQ and class plaintiffs.[3] On November 22, 1989, the district court gave preliminary approval to the settlement between LAQ and plaintiffs as reasonable, adequate and fair, and directed that notice of the settlement be given to class members.

Kaiser and U.S. Gypsum also objected to the district court's final approval of the LAQ settlement. On February 16, 1990, the district court approved LAQ's settlement with the class and directed that final judgment be entered under Fed. R. Civ. P. 54(b). Kaiser App. 21a-26a, 30a-33a; U.S. Gypsum Pet. App. 119a-128a. The district court also held that Kaiser and U.S. Gypsum had failed to show they had standing to contest the settlement under any exception to the general rule that non-settling defendants lack standing to object to a partial settlement.

Kaiser and U.S. Gypsum appealed the district court's approval of the LAQ settlement, attacking the court's assertion of subject

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[2] The full text of paragraph 12 of the LAQ settlement agreement is set forth in the court of appeals opinion. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 9a; U.S. Gypsum Pet. App. 51a-52a.

[3] Petitioners W.R. Grace & Co. and Fibreboard Corporation did not challenge the LAQ settlement in the courts below.

matter jurisdiction and the process through which the court approved the settlement, but not the reasonableness of the LAQ settlement agreement itself. On December 13, 1990, in its LAQ settlement opinion, the court of appeals affirmed the judgment of the district court, holding that Kaiser and U.S. Gypsum lacked standing to challenge the settlement agreement between LAQ and the plaintiff class. *In re School Asbestos Litigation*, 921 F.2d 1330; Kaiser App. 1a-20a; U.S. Gypsum Pet. App. 45a-63a. The court of appeals found that appellants did not have standing based on any adverse effect on their contribution or indemnity rights because the settlement agreement and the order approving the settlement contained no limit on any claims of non-settling defendants. The court of appeals did not reach the issue whether adequate notice procedures were followed in the settlement approval process. Having determined in a separate opinion, filed the same day, that subject matter jurisdiction was proper in the district court, the court of appeals did not reconsider subject matter jurisdiction in the LAQ settlement opinion.

Following the court of appeals' denial of their petitions for rehearing and suggestions for rehearing *en banc*, Kaiser App. 83a-86a; U.S. Gypsum Pet. App. 79a-81a, petitioners sought writs of certiorari to review the judgments and opinions of the Third Circuit Court of Appeals. In these petitions, Kaiser and the U.S. Gypsum petitioners again argue that the district court lacks subject matter jurisdiction over the claims from which LAQ was dismissed. Only Kaiser argues that it was improperly denied standing by the court of appeals.

REASONS FOR DENYING THE WRITS

I. THE COURT OF APPEALS FOR THE THIRD CIRCUIT DID NOT DECIDE THE QUESTIONS PRESENTED BY THE U.S. GYPSUM PETITIONERS.

The court of appeals did not decide the questions raised by the U.S. Gypsum petition for writs of certiorari. In the LAQ settlement opinion, the court of appeals merely held that Kaiser and U.S. Gypsum lacked standing to challenge the LAQ settlement

agreement. *In re School Asbestos Litigation*, 921 F.2d at 1331-33; Kaiser App. 5a-10a; U.S. Gypsum Pet. App. 48a-53a. The court determined that Kaiser and U.S. Gypsum lacked standing because the settlement agreement specifically recognized the existence of non-settling defendants' indemnification and contribution rights against LAQ, and the district court's approval of the settlement contained no ruling purporting to limit any claims non-settling defendants may have. *Id.* at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The only Questions Presented by the U.S. Gypsum petitioners, *see* U.S. Gypsum Petition at i, concern the sufficiency of plaintiffs' allegations to support diversity subject matter jurisdiction, and diversity among individual members of a plaintiff class and defendants.* The court of appeals addressed these issues in a separate, comprehensive opinion holding that none of petitioners' arguments on jurisdictional defects demonstrated a lack of federal diversity subject matter jurisdiction to require dismissal of the action. *See In re School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990); Kaiser App. 34a-76a; U.S. Gypsum Pet. App. 1a-44a. Having found jurisdiction proper in the district court, the court of appeals did not and need not have re-determined in the LAQ settlement opinion whether plaintiffs' allegations supported subject matter jurisdiction over the action. Indeed, the court of appeals explicitly separated the issues raised in its two opinions, noting that it had concluded its treatment of the subject matter jurisdiction question before considering the appeal taken from the LAQ settlement. *In re School Asbestos Litigation*, 921 F.2d at 1332; Kaiser App. 5a-6a; U.S. Gypsum Pet. App. 49a.

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* The first of two Questions Presented by Kaiser, *see* Kaiser Petition at i, also seeks review of various subject matter jurisdiction issues. Although it also purports to challenge the dismissal of the class members' claims against LAQ, it does not seek review of the standing decision in the LAQ settlement opinion. Only Kaiser's second Question Presented concerns standing to challenge the LAQ settlement. The court of appeals had no occasion to consider the precise issue Kaiser raises in its second Question Presented, *viz.*, whether non-settling defendants can raise alleged defects in the settlement approval process. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The U.S. Gypsum petitioners have also sought writ of certiorari to review the court of appeals' subject matter jurisdiction opinion. *See supra* p. 2, note 1. The court of appeals did not decide subject matter jurisdiction in the LAQ settlement opinion, and writ of certiorari to review that opinion would not lead to consideration of the jurisdictional questions the U.S. Gypsum petitioners present.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN DENYING PETITIONERS STANDING TO CHALLENGE THE LAQ SETTLEMENT.

There is no conflict among the circuits on the legal standard a court should apply to determine whether a non-settling defendant has standing to object to a partial settlement. As set forth in the leading appellate authorities, a non-settling defendant does not have standing to object to a partial settlement unless it can show some cognizable prejudice to a legal relationship between it and the settling parties. *Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230 (7th Cir. 1983); *In re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Utility Contractors Ass'n of New Jersey, Inc. v. Toops*, 507 F.2d 83 (3d Cir. 1974). The court of appeals employed this standard, *In re School Asbestos Litigation*, 921 F.2d at 1332-33; Kaiser App. 7a-8a; U.S. Gypsum Pet. App. 51a, and even the dissenting judge, upon whose opinion petitioners place so much reliance, agreed with the majority that this standard should apply. *Id.* at 1335; Kaiser App. 14a; U.S. Gypsum Pet. App. 57a.

Kaiser seems to suggest that the standard of law used by the court of appeals should not govern in this case.[5] The essence of

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[5] Kaiser argues that the standard applied by the court of appeals is inapplicable because it was developed in antitrust litigation where defendants have no rights

(Footnote continued)

Kaiser's position is that where there are rights of contribution or indemnity among defendants, any partial settlement may affect those rights, and therefore non-settling defendants should automatically have standing. Kaiser Petition at 28, n.17. In the standing analysis, however, there is no talismanic significance to non-settling defendants' rights to contribution or indemnity. The uncontroverted standard of law on non-settling defendants' standing to object to a partial settlement is applied where rights to contribution and indemnity are made an issue just as it is to any other issue. Any other rule would discourage settlements in complex litigation, because settlement would not fully extricate a defendant from the litigation in which he sought to buy his peace. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 9a-10a; U.S. Gypsum Pet. App. 52a.

No appellate court has found reason to vary the long-accepted standard on non-settling defendants' standing to contest partial settlements. The court of appeals employed the correct rule of law, and its decision raises no novel legal issue that requires review by this Court.

A. The Court of Appeals' Decision Correctly Applied Well-Settled Law.

The court of appeals' decision denying petitioners' claim that their rights to contribution or indemnity were prejudiced by the LAQ settlement is merely a case-specific application of the universally-accepted rule that a non-settling defendant does not have standing. The decision reflected an appropriate appellate response to review of a settlement agreement, which, like many settlements in multiple-defendant cases involving joint and

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of contribution at all. Kaiser Petition at 27-28, n.16. Kaiser is wrong. Although the Fifth Circuit's influential decision in *In re Beef*, which Kaiser cites to support its position, arose in the context of an antitrust class action, it was neither the first time such a standard was enunciated, *see Toops*, 507 F.2d at 86 (dispute between class of unions and class of municipalities over partial settlement), nor the only context in which the courts have applied this standard. *See, e.g., Waller*, 828 F.2d at 583 (Rule 10b-5 class action); *Quad/Graphics*, 724 F.2d at 1233 (corporate contract dispute).

several liability, preserved non-settling defendants' rights to contribution or indemnity in the form of a judgment reduction provision.

Kaiser argued below that it had suffered legal prejudice and hence had standing to challenge the LAQ settlement because the settlement agreement barred it from pursuing claims for contribution or indemnity against LAQ. The court of appeals held that petitioners had failed to demonstrate legal prejudice. Specifically, the court of appeals found that the settlement agreement expressly took account of these petitioners' rights of contribution and indemnity:

> [t]he settlement agreement in this case specifically recognizes the existence of indemnification and contribution rights of non-settling defendants and the Order approving the settlement contains no ruling purporting to limit any claims non-settling defendants may have.

In re School Asbestos Litigation, 921 F.2d at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The court of appeals referred to paragraph 12 of the LAQ settlement agreement, which allows for the operation of state laws governing contribution and indemnity rights in partial settlements and accounts for non-settling defendants' rights to contribution and indemnity by incorporating a judgment reduction provision. This provision reflects the fact that, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), issues of indemnity or contribution in this diversity class action will be resolved under the differing laws of the jurisdictions in which the substantive claims of the class members arise.

As the court of appeals found, the terms of the LAQ settlement agreement expressly provide that in the event a non-settling defendant were to obtain a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against that defendant would be adjusted by any portion of

the recovery attributable to LAQ. When, as here, a settlement agreement specifically provides for non-settling defendants' rights to contribution and indemnity, the "legal prejudice" exception to the rule against co-defendant standing is not satisfied. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1387 n.11 (D. Md. 1983) (non-settling defendants lacked standing where settlement expressly provided for a *pro rata* reduction of damages against the non-settling defendants should settling defendants be liable for contribution under state law).[6] The LAQ settlement agreement does not, in and of itself, extinguish any of petitioners' legal rights and, as the court of appeals correctly found, neither did the district court's order approving the settlement.

It might be a different issue, but not the issue presented below, if a settlement agreement purported to ignore or defeat non-settling defendants' rights to contribution or indemnity as a condition of the settlement. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 232 (1990) (non-settling defendants in a securities class action had standing to object to a partial settlement that was expressly conditioned on obtaining an order from the district court barring non-settling defendants' pre-existing rights to contribution and indemnity). The court of appeals properly found that under the terms of the LAQ settlement, petitioners suffered no legal prejudice and hence had no standing.

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[6] *See also*, 2 H. Newberg, *Newberg on Class Actions* §11.54 n.472 (2d ed. Supp. 1990.)

When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law or, in the absence of statute, by a reduction in the judgment against non-settling defendants by the amount of any contribution judgment against settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, non-settling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement.

B. The Court of Appeals' Decision Denying Kaiser Standing Does Not Conflict With This Court's Decision In *Shutts*.

Petitioner Kaiser asserts, in reliance upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that it should have had standing to object to the district court's notice procedures to ensure that all class members are bound by the judgment reduction provisions of the settlement. Kaiser Petition at 29. Kaiser's argument is a tempest in a teapot. If in the future, a plaintiff were to challenge the *res judicata* effect of the judgment effecting the LAQ settlement and a court were to find that notice of the settlement had been inadequate, the judgment would not bind the plaintiff who had received inadequate notice. He would then be unable to share in the settlement proceeds and free to commence a separate action against LAQ. To the extent LAQ and Kaiser were both named in the subsequent action and Kaiser had a valid contribution claim against LAQ,[7] Kaiser could seek a judgment over for contribution or indemnity directly from LAQ in that later action. Conversely, if notice of the LAQ settlement was adequate, then the judgment effecting the settlement agreement is binding and the contribution and indemnity provisions therein can be enforced by Kaiser against class members.

This analysis is in no way altered by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* neither varies nor creates a new exception to the rule against standing for non-settling defendants to attack a partial settlement. *Shutts* was decided on the appeal of the sole defendant in the action following a final liability judgment against it. Kaiser conveniently overlooks this central — and dispositive — distinction between *Shutts* and the partial settlement posture

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[7] In this action, claims for contribution and indemnity between a supplier of raw asbestos fiber, such as LAQ, and a manufacturer of asbestos construction products, such as Kaiser, will largely, if not exclusively, be determined by their purchase and sale relationship. LAQ never supplied or sold any asbestos fiber to Kaiser.

in which the court of appeals considered the LAQ settlement. In *Shutts*, no other party shared the defendant's interest in ensuring the broadest possible preclusive effect of the judgment. Non-settling defendant Kaiser, however, suffers no legal prejudice as a result of being denied standing to critique the form or manner of notice of LAQ's partial settlement, because LAQ's interest in ensuring the maximum preclusive effect of notice to the class, and the district court's obligation to review the settlement notice, adequately protect Kaiser's interests as a matter of law. *See In re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11, 14-15 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980) (non-settling defendant lacks standing to attack adequacy of partial settlement notice); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 172-73 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (same).

Kaiser cannot demonstrate that any feature of the LAQ settlement or the notice and approval procedures employed by the district court has injured it. Kaiser has retained the benefits of all rights it is entitled to under the law as a non-settling defendant. Kaiser cannot show legal prejudice, and thus has no standing.

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari should be denied.

Respectfully submitted,

FREDERICK B. LACEY
Counsel of Record
MOLLY S. BOAST
JOYCE HELLER
LEBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Attorneys for Respondent
Lac d'Amiante du Quebec, Ltee

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No. 90-1378

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES GYPSUM COMPANY, ET AL., PETITIONERS

v.

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,
And A Conditionally Certified Class, RESPONDENTS

and

THE HONORABLE JAMES MCGIRR KELLY,
NOMINAL RESPONDENT

IN RE ASBESTOS SCHOOL LITIGATION

D.C. Master File No. 83-0268

Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

THOMAS W. KIRBY *
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20019
(202) 429-7000
Attorney for Kaiser Gypsum Company, Inc.

JOHN H. LEWIS, JR.*
PETER BUSCEMI
JOSEPH B.G. FAY
J. GORDON COONEY, JR.
ANDREW D. LEIPOLD
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000
Attorneys for United States Gypsum Company

* Counsel of Record for this Petitioner

[Additional Counsel on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

DENIS MCINERNEY *
ALLEN S. JOSLYN
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for
W.R. Grace & Co.

* Counsel of Record
for this Petitioner

WILLIAM J. O'BRIEN *
NANCY J. GELLMAN
CONRAD O'BRIEN GELLMAN
DESTEFANO & ROHN, P.C.
1515 Market Street
16th Floor
Philadelphia, PA 19102
(215) 864-9600
Attorneys for
Fibreboard Corporation

April 10, 1991

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1378

UNITED STATES GYPSUM COMPANY, ET AL., PETITIONERS

v.

BARNWELL SCHOOL DISTRICT NO. 45,
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Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

Respondent school districts ("plaintiffs") and Lake Asbestos of Quebec Ltd. ("LAQ") raise five arguments in response to the petition for certiorari filed by United States Gypsum Company and others in No. 90-1378 ("the petition"). None of these arguments alters the conclusion that the court of appeals has issued an unprece-

dented ruling that expands federal diversity jurisdiction. The petition should be granted.[1]

1. *The challenge to the jurisdictional allegations is not moot.* Plaintiffs argue that the court of appeals' rulings have been effectively superseded in this action, because shortly after the opinions below were filed, the district court allowed the plaintiffs to amend the class definition to include only those schools that have or had friable asbestos-containing building material. Br. in Op. at 3. Plaintiffs then say:

> Defendants have not contested the good faith allegation that each class member with friable asbestos in a school building who seeks compensatory and punitive damages has a claim exceeding $10,000.

Id. at 3-4. Plaintiffs argue that the class redefinition has therefore taken the amount in controversy issue "out of the case." [2] *Id.* at 10.

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[1] The questions presented in No. 90-1378 are:

1. Whether under the federal diversity statute, 28 U.S.C. § 1332, plaintiffs in a diversity case must include in the complaint factual allegations sufficient to support subject matter jurisdiction over each of the claims presented.

2. Whether in a diversity-based class action brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure, each plaintiff must be diverse from each defendant from whom that plaintiff seeks to recover.

[2] Plaintiffs suggest that the class redefinition by its terms excludes those plaintiffs whose claims were for less than $10,000. *See* Br. in Op. 3. In fact, the new definition simply eliminates those school districts that do not have friable asbestos, with no mention of the amount in controversy. *Id.* at A-1. Of course, even if the new definition had included a limitation based on the jurisdictional amount (*e.g.*, "those schools with claims in excess of the jurisdictional minimum"), such a definition would have been improper; this type of tautological definition was specifically rejected by the district court in *Zahn v. International Paper Co.*, 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973).

This argument is extremely misleading, because it erroneously implies that plaintiffs have actually *made* "the good faith allegation" that each member of the newly-defined class had a claim in excess of the jurisdictional amount when the complaints were filed. In fact, plaintiffs have never sought leave to amend the existing complaints to allege that "each" member of the redefined class either has or had a claim in excess of $10,000. The jurisdictional allegations today are identical to those that were before the court of appeals and the district court; these pleadings admit that the claims of an unknown number of plaintiffs fail to satisfy the requirements of § 1332(a), and fail to make an allegation on behalf of a single unnamed class member that would permit the district court to exercise jurisdiction over that class member's claims. *See* App. 91a; Br. in Op. at 8-9 n.16.

Nor has the district court concluded *sua sponte* that each member of the newly-defined class could make the required allegation. Although plaintiffs suggest that the opinion accompanying Pretrial Order No. 273 makes such a determination, a full reading of the opinion shows that the court was summarizing plaintiffs' suggestions regarding the impact of the redefinition.[3] The district court, however, overstated the plaintiffs' representations: while plaintiffs strongly implied that the redefinition would moot the amount-in-controversy issue, they never specifically alleged that the redefinition would eliminate all class members who did not have a jurisdictionally sufficient claim. In fact, when questioned by the court of ap-

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[3] The complete quotation from the district court's opinion accompanying Order No. 273, which plaintiffs set forth in part at page 10 of their Brief, is that "the *Plaintiffs* have concluded that it would be appropriate to amend the class definition so as to include only those school systems that contain 'friable' asbestos products, and thus only those school systems that can in good faith assert claims in excess of $10,000." Br. in Op. at A-2 (emphasis added); *see also id.* at A-4.

peals on this exact point, plaintiffs' counsel would *not* say that each of the remaining class members could make the necessary allegation. All counsel would say is that "virtually" all plaintiffs could make the required allegation if the class were redefined. App. 130a. Even in this Court, plaintiffs have stopped short of saying that the required allegation can be made.

If plaintiffs were to amend the complaints to actually allege what they consistently hint at—that each member of the existing class had a sufficient claim—this issue might truly be moot. But the only logical conclusion that can be drawn from the failure to make the required allegation is that plaintiffs simply cannot do so in good faith. School districts with *currently* friable asbestos-containing products did not necessarily have a claim in excess of $10,000 at the time the complaints were *filed*, which is, of course, the critical time for determining subject matter jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). Plaintiffs have repeatedly argued that asbestos-containing products may "become" friable over time, and thus, it would be impossible to make a blanket assertion that those schools that now have friable asbestos-containing products necessarily had friable products in their buildings in 1983, when these actions began.[4]

In short, the amount-in-controversy question is not moot, because the class redefinition has not affected the question presented in any meaningful way. This petition is directed to the complaints, and the complaints still do

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[4] Even if all the schools left in the class had friable asbestos-containing building products in 1983, and even if it were possible to determine today what year a product became friable, it still would be unlikely that the required allegation could be made. Plaintiffs indicate that some members of the newly defined class could only make a sufficient claim if punitive damages were included. *See* Br. in Op. at 3-4. Several states, however, do not allow punitive damages. *See, e.g., Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472, 474 (1975) (Nebraska law).

not allege—and plaintiffs apparently cannot allege—that each class member had a claim in excess of $10,000. The decisions below still permit the district courts to proceed on the assumption that subject matter jurisdiction is proper. Subsequent events have not made the problems created by these decisions less troublesome, *see* Pet. at 16-20, and therefore have not vitiated the need for review by this Court.[5]

2. *The district court has never had jurisdiction over the claims of the absent class members.* Another reason offered for denying certiorari is as follows: plaintiffs argue that the district court "undoubtedly" had and has jurisdiction over these "cases" because "there are *named* plaintiffs with claims for more than $10,000 and citizenship diverse to that of defendants." Br. in Op. at 10 (emphasis added). They further argue (without citation to authority) that the question is not whether the federal court has jurisdiction, but merely how many of the un-

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[5] Indeed, recent events have confirmed the need for further review. In their petition, U.S. Gypsum and others identified the "one-way intervention" phenomenon as a danger created by the decisions below. Pet. at 14-15. An example of this problem may now be occurring in the "Agent Orange" litigation, another national, diversity-based class action in federal court. Defendants in that case thought they had reached a settlement in 1984 with all individuals who could assert claims based on exposure to Agent Orange. *See In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2d Cir.), *cert. denied*, 484 U.S. 1004 (1987). After a settlement was reached, a new group of plaintiffs filed a separate class action in Texas state court, arguing that they were not bound by the earlier judgment because their claims had not yet arisen by 1984. Although defendants removed the action to federal court and sought to have the case assigned to the trial judge who presided over the federal class action, plaintiffs have sought remand on the ground that the federal courts lack subject matter jurisdiction over the newly-filed action, since diversity is lacking. Defendants in that litigation now face the possibility of litigating against individuals whom they thought would be bound by the earlier judgment. Although plaintiffs in the Texas action have not yet argued that the federal court lacked diversity jurisdiction over their claims in the first class action, the case highlights the dangers faced by defendants here.

named plaintiffs are proper members of the class. Plaintiffs contend that it would be "burdensome and unnecessary" for the district court to make such a determination now, eight years after the litigation began, and that continued deferral of the pleading requirement is therefore appropriate. *Id.* at 10.

This argument is pointless. The issue is the district court's jurisdiction over *claims*, not "cases"; U.S. Gypsum has sought only to prohibit the district court from adjudicating the claims of absent class members until a pleading sufficient to invoke the district court's jurisdiction over those claims is filed. The fact that the *named* plaintiffs allege a claim in excess of $10,000 does not give the court jurisdiction over the claims of any class member for which no such allegation has been made; that is the holding of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

Plaintiffs' declaration that the district court "surely" has had jurisdiction since the complaints were filed also ignores the settled rule that unless and until the pleadings set forth a sufficient basis to invoke jurisdiction, a federal court has no authority over the claims. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936); *Turner v. President, Directors and Company of the Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799). *See also* Pet. at 13. The fact that it may be "inconvenient" or "burdensome" for a federal court to establish its own jurisdiction has never been a proper basis to excuse the failure to make the required pleading. *Cf. Aldinger v. Howard*, 427 U.S. 1, 15 (1975). Plaintiffs should not be allowed to gloss over this failure by pretending that this issue involves nothing more than an administrative task of dismissing parties. *See* Br. in Op. at 9-10.

Finally, the district court already has issued more than 300 pretrial orders, granted partial summary judgment in favor of several defendants against the entire

class, and entered a final judgment that dismissed the claims of all plaintiffs against LAQ with prejudice. *See* Pet. at 19. All of these actions were taken without determining which claims were properly before the court. Despite plaintiffs' assertions to the contrary, this is the behavior of a court of general jurisdiction: the district court has assumed jurisdiction over the claims before it with no factual allegation or proof to support that assumption, solely for the purpose of maintaining the largest possible plaintiff class.

3. *Rule 12(d) does not grant the power to postpone a facial attack to the court's subject matter jurisdiction.* The petition provides several reasons why the court of appeals' reliance on Fed. R. Civ. P. 12(d) is misplaced. Pet. at 17-18. Plaintiffs do not respond to these points; they do, however, make a new attempt to reconcile Rule 12(d) with Rule 12(h)(3), which requires the court to dismiss "whenever it appears" that subject matter jurisdiction is lacking. Plaintiffs argue that Rule 12(h) "indicates only when particular kinds of objections must be raised to avoid waiver." Br. in Op. at 9 n.17.

This interpretation is different (although no more persuasive) than the court of appeals' similar attempt to avoid the plain language of the Rule. *See* Pet. at 17. Rule 12(h)(3) is a directive to the *court*, not the parties, which requires dismissal once it "appears" that there is no jurisdiction. It is hard to imagine an instance where the lack of jurisdiction is more apparent than when the defect appears on the face of the complaint. This distortion of the Rules of Procedure, and the resulting expansion of federal court authority over state law claims, is reason enough for this Court to review the decisions below.

4. *The Judicial Improvements Act does not undermine the importance of the complete diversity issue.* For the second question presented, plaintiffs raise only one point

that is not addressed in the petition. They argue that the Judicial Improvements Act of 1990 (the "Act") now provides that in diversity-based class actions filed after December 1, 1990, district courts may exercise "supplemental" jurisdiction over the claims of, *inter alia*, absent class members who are not diverse from the defendants. Accordingly, plaintiffs argue, any issue regarding the requirements of § 1332 as applied in class actions is now of limited importance. Br. in Op. at 11-13.

The impact of the Judicial Improvements Act on future diversity-based class actions is at best unclear. As plaintiffs acknowledge, the "new statute was 'not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley* [*v. United States*, 490 U.S. 545 (1989)]' " Br. in Op. at 12 (*quoting* H.R. Rep. No. 734, 101st Cong., 2d Sess. at 29 (1990)). The interpretation of § 1332 prior to the Act therefore will continue to affect future cases, and the validity of a "class action exception" to the traditional rule of complete diversity remains a matter of great importance.

Plaintiffs also suggest that Congress's reaction to *Finley*, as reflected in the Act, undercuts the merits of the petition. *Finley*, however, was simply the latest in a series of cases that limited the availability of pendent and ancillary jurisdiction over the claims of absent class members. It was these decisions, not simply *Finley*, that effectively undermined whatever continuing force the *dicta* from *Snyder v. Harris*, 394 U.S. 332 (1969), may have had. *See* Pet. at 23-28.

In any event, by its terms the Act has no application to the current cases. There never has been a holding by this Court on whether class actions are entitled to a rule of "limited diversity," an issue that is squarely presented by this Petition. Given the significance of this question generally, and the apparent intent of the Act to preserve pre-*Finley* doctrine, this case presents the ideal opportunity to resolve this issue.

5. *The questions presented were raised and decided in the appeal from the LAQ settlement.* Respondent LAQ argues that the questions in the petition were "not decide[d]" in the appeal from the final judgment approving the settlement between LAQ and the plaintiffs. LAQ Br. in Op. at 4-6. This is incorrect. In the district court and the court of appeals, petitioners raised the same challenges to the courts' subject matter jurisdiction that are raised in the petition. The court of appeals squarely rejected the appeals, and affirmed the entry of final judgment.

It is the LAQ opinion that makes the pernicious effects of the rulings below most clear. It was in the LAQ opinion that the court of appeals took its earlier rationale that allowed a *deferral* of the jurisdictional inquiry, and with a leap of logic, transformed it into a ruling that "jurisdiction in the trial court was proper." App. 49a. By affirming the judgment, the court of appeals therefore has made it clear that a federal court can finally resolve claims without ever having determined that it had authority to do so, and without requiring a sufficient pleading. This is precisely the issue raised in the petition.

Finally, if petitioners are correct that the district court lacks subject matter jurisdiction on the basis of the current complaints, it would make little sense to allow the affirmance of the LAQ final judgment to stand. Review of both opinions below is therefore warranted.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted,

THOMAS W. KIRBY *
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20019
(202) 429-7000
Attorney for Kaiser Gypsum Company, Inc.

JOHN H. LEWIS, JR.*
PETER BUSCEMI
JOSEPH B.G. FAY
J. GORDON COONEY, JR.
ANDREW D. LEIPOLD
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000
Attorneys for United States Gypsum Company

DENIS MCINERNEY *
ALLEN S. JOSLYN
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for W.R. Grace & Co.

WILLIAM J. O'BRIEN *
NANCY J. GELLMAN
CONRAD O'BRIEN GELLMAN
- DESTEFANO & ROHN, P.C.
1515 Market Street
16th Floor
Philadelphia, PA 19102
(215) 864-9600
Attorneys for Fibreboard Corporation

* Counsel of Record for this Petitioner

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